Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

WFAA-TV, INC. AND ROBERT RIGGS,

Petitioners,

v.

CARVER DAN PEAVY AND SALLY PEAVY,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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October 30, 2000

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QUESTIONS PRESENTED

1. Whether the imposition of civil liability on a media defendant under 18 U.S.C. § 2511(1)(c) and (d), and a parallel Texas state wiretap statute, for using or disclosing the contents of illegally intercepted communications violates the First Amendment to the United States Constitution.

2. Whether the imposition of liability under 18 U.S.C. § 2511(1)(c) and (d) requires a showing that the defendant "know[s] or ha[s] reason to know that the information was obtained . . . in violation of this subsection."

LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner states that the parties to the proceeding in the court of appeals were:

Carver Dan Peavy, Plaintiff-Appellant/Cross-Appellee
Sally Peavy, Plaintiff-Appellant/Cross-Appellee
WFAA-TV, Inc., Defendant-Appellee/Cross-Appellant
Robert Riggs, Defendant-Appellee/Cross-Appellant
United States of America, Intervenor

WFAA-TV, Inc. is now WFAA-TV, L.P. Its general partner is WFAA-TV of Texas, Inc., and its limited partner is WFAA Holdings, Inc. Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that the A.H. Belo Corporation, a publicly held corporation, owns more than 10% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

WFAA-TV, L.P. and Robert Riggs respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 221 F.3d 158. The opinion of the district court (Pet. App. 61a-110a) is reported at 37 F. Supp.2d 495.

JURISDICTION

The court of appeals entered its judgment on July 31, 2000. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." Relevant provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. § 2510, *et seq.*, and the Texas Wiretap Act, Tex. Civ. Prac. & Rem. Code Ann. § 123.001, et seq. (Vernon 1986) are set forth in the Appendix at Pet. App. 111a-112a, *infra*.

STATEMENT

This case presents the same First Amendment question as *Bartnicki v. Vopper*, No. 99-1687, and *United States v. Vopper*, No. 99-1728, *cert. granted*, 120 S. Ct. 2716 (June 26, 2000) (oral argument scheduled for Dec. 5, 2000). The Court should therefore hold this petition in abeyance pending the disposition

of *Bartnicki*, Nos. 99-1687 and 99-1728, just as this Court is evidently holding in abeyance the petition in *McDermott v. Boehner*, No. 99-1709.

Like *Bartnicki*, this case presents the question of the constitutionality of two provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended. Section 2511(1)(c) makes it unlawful for any person to "intentionally disclose[], or endeavor[] to disclose, to any other person the contents of any wire, oral, or electronic communication" if the person "know[s] or ha[s] reason to know" that it "was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. § 2511(1)(c). Section 2511(1)(d) makes it unlawful for any person, with the same knowledge or reason to know, to "intentionally us[e], or endeavor[] to use, the contents of any wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(d).

This case, like *Bartnicki*, presents the question of whether the imposition of civil liability on a media defendant under 18 U.S.C. § 2511(1)(c) and (d), and parallel state wiretapping statutes, for using or disclosing the *contents* of illegally intercepted communications violates the First Amendment. This prohibition is a direct, content-based ban on speech and nothing but speech. The statute does not simply restrict media defendants from broadcasting illegal interceptions; it requires a court to engage in a painstaking inquiry into the substance of a media defendant's speech, its newsgathering processes, and its editorial decisions in order to decide whether the defendant has learned the information in question from an illegal interception.

This case also presents a separate question warranting this Court's plenary review: Whether the imposition of liability under 18 U.S.C. § 2511(1)(c) and (d) requires a showing that the defendant "know[s] or ha[s] reason to know that the information was obtained . . . in violation of this subsection." Accordingly, this case is worthy of this Court's plenary review regardless of the outcome of *Bartnicki*.

1. Background. As the district court explained below, "[t]his case presents a classic conflict between the right to privacy and the right of a free press to publish truthful and newsworthy information." Pet. App. 91a. "This case started with the breakdown of common civility between neighbors. It led to a public scandal that resulted in a highly publicized criminal trial . . . ." *Id.* at 64a. "Succinctly stated, plaintiffs got caught with their hands in the 'cookie jar' and are upset that the media exposed their misdeeds." *Id.* at 64a-65a.

This case arises out of the interception of certain cordless telephone conversations involving a public official, respondent Carver Dan Peavy (Peavy), who was elected a trustee for the Dallas Independent School District (DISD) from 1986 until 1995. Pet. App. 2a. By the early 1990s, Peavy controlled purchases of insurance for DISD employees. He was a friend and business associate of insurance agent Eugene Oliver, a felon who had been convicted as an accomplice to murder in an insurance scam. *Id.* Together, Peavy and Oliver allegedly executed an insurance kickback scheme affecting DISD employees.

Peavy's telephone conversations were intercepted not by petitioners WFAA-TV and Riggs, but by Peavy's next-door neighbor, Charles Harman, with whom Peavy had been involved in an ongoing series of disputes. In December 1994, Harman obtained a police scanner to monitor criminal activity in his neighborhood. Pet. App. 65a. The first time Harman used the scanner, he intercepted a signal from a cordless telephone used by Peavy. Harman overheard Peavy talking to another neighbor about filing a class-action lawsuit against Harman and his wife. *Id.* This piqued Harman's interest, and he continued to monitor Peavy's phone calls. Later that same day, Harman heard Peavy tell an unidentified party "how much money [he] was making off the insurance policies at DISD." *Id.*

Harman testified that he consulted the Dallas County District Attorney's office regarding the intercepted conversations. According to Harman, he asked Assistant District Attorney Bill

Geyer whether it would be lawful to listen to the cordless telephone conversations, and Geyer responded, "Absolutely." Pet. App. 65a. Harman then inquired whether he could record the telephone calls. According to Harman, Geyer replied, "Go ahead. Anything over the air is free." *Id.*

Harman began to record some of Peavy's telephone conversations. Harman then called District Attorney John Vance to inform him that Peavy had made certain threats against Harman and that Peavy was engaged in possible improprieties regarding DISD insurance. Pet. App. 66a. Vance agreed to meet with Harman after the first of the year (1995). Vance instructed Harman to "keep taping" until then. *Id.* Vance ultimately met with Harman on January 17, 1995. Also present were Assistant District Attorney Mike Gillett and Investigator Bob Jennings. According to Harman, all the participants reassured him that his actions were legal. *Id.* at 66a n.3.

Harman, however, was not satisfied with the response from the authorities. He believed that he was getting the "run around." Pet. App. 66a. His frustrations eventually led him to contact the media. On December 8, 1994, Harman called WFAA-TV and spoke to P.J. Ward, a field producer and former director of a consumer hot-line known as "Contact 8." *Id.* Harman said that he was in possession of information concerning possible corruption of an unnamed public official. *Id.* Ward questioned Harman about his allegations and determined that the official was Peavy. *Id.*

The information was passed on to senior reporter Robert Riggs for further investigation. Riggs called Harman later that day. Pet. App. 66a. Harman said he had proof that Peavy had threatened to harm him and was involved in an insurance kickback scheme. *Id.* However, he stated that he wanted to discuss these matters only in person at his home. *Id.*

Riggs met with Harman and his wife on December 9, 1994. Pet. App. 67a. Harman played portions of a tape-recorded conversation between Peavy and another party in which they discussed a plan to split commissions on cancer insurance sold

to Mary Kay Cosmetics. *Id.* Riggs was stunned to hear these remarks from a public official. *Id.* Harman indicated that he planned to record future telephone calls and asked Riggs if he wanted copies of the tapes. *Id.* at 67a. Riggs replied that he did. However, so that the authenticity of the tapes could not be questioned, Riggs asked Harman not to edit the tapes. *Id.*

Riggs also asked Harman whether it was legal to record these conversations. Pet. App. 67a. Harman assured him that his actions had been approved by the Dallas County District Attorney and the Dallas Police Department. *Id.* Riggs returned to WFAA-TV and played portions of the tape for Ward and News Director John Miller. All agreed that there was credible evidence of public corruption that should be investigated. *Id.* However, they first contacted their attorney, Paul Watler, to determine whether it was legal to use the tape recordings. *Id.* Watler told Miller that WFAA-TV could accept and broadcast the tapes. *Id.* This advice was confirmed in a written legal memorandum dated January 4, 1995. *Id.*

Thereafter, Harman provided WFAA with 18 tapes containing 188 telephone conversations between Peavy and others. Pet. App. 67a. Ward listened to the tapes, took notes, and attempted to transcribe the conversations. However, some of the tapes were of poor quality and difficult to understand. Ward selected relevant portions of the tapes and had them transcribed by a professional court reporter. *Id.* Copies of the transcripts were furnished to Riggs, Miller, and Watler in February 1995. *Id.*

Several weeks later, Riggs was informed by a law enforcement source about a recent amendment to Title III. Pet. App. 67a. Riggs contacted Watler to determine whether the interception of cordless telephone calls was prohibited under the new law. *Id.* Watler researched the issue and learned that an October 1994 amendment made it unlawful to intercept the radio portion of a cordless telephone call. He immediately advised WFAA not to accept any additional tapes from Harman, not to broadcast the tapes already in its possession, and not to confront

individuals about conversations on the tapes. *Id.* But Watler told WFAA and Riggs that they could continue to investigate Peavy. WFAA and Riggs followed this advice. Riggs returned the original tapes to Harman on or about March 1, 1995. Copies of the tapes and all related documents were delivered to Watler for safekeeping. *Id.* at 67a-68a.

Harman also learned that it was illegal to tape these telephone conversations. FBI Agent Mark Chapman met with Harman on March 14, 1995 and showed him a copy of the new law. Pet. App. 68a. Harman mistakenly believed that he could still listen to the phone calls as long as he did not tape them. Nevertheless, Harman recorded at least one other conversation. He later pled guilty to federal wiretap violations and paid a $5,000 fine in connection with this recording. *Id.*

Meanwhile, WFAA continued to investigate Peavy, without receiving any more tapes from Harman. Pet. App. 68a. Riggs learned that Peavy had been appointed by the president of the school board to solicit new bids on group term life and disability insurance for DISD employees. *Id.* Peavy had designated his associate Eugene Oliver as the exclusive insurance agent to obtain these bids. The contracts were ultimately awarded to two companies represented by Oliver. Thereafter, Oliver split his commissions totaling more than $1 million with Peavy and several others. *Id.* Riggs also uncovered a similar arrangement between Peavy and Oliver involving a cancer insurance policy that Oliver was negotiating with Mary Kay Cosmetics. *Id.*

In the summer of 1995, WFAA aired a three-part series regarding the relationship between Peavy and Oliver. Pet. App. 68a. WFAA did not play or even mention any of the tapes received from Harman during the broadcasts. *Id.* On July 31, 1995, DISD Superintendent Chad Woolery announced an investigation into the school district's insurance program. Peavy was ultimately stripped of his authority over insurance procurement, and DISD stopped paying agent commissions on all insurance contracts. *Id.*

The FBI conducted a parallel criminal investigation during

the same time period. As a result of this investigation, Peavy and Oliver were indicted on more than forty counts of official bribery, conspiracy, and income tax evasion, although they were eventually acquitted of all charges. Pet. App. 68a.

On September 28, 1995, audiotapes of some of Peavy's telephone conversations were anonymously distributed to at least three DISD board members. In those conversations, Peavy used extremely offensive racial epithets, profanity, and derogatory remarks to describe minority students and school district personnel. For example, Peavy stated: "anybody that would go out there to these schools and take these mother fucking ignorant god-damn little niggers and everything else and all these chicken-shit parents for forty five thousand a year, you've got to kiss my fucking ass." *Peavy v. New Times, Inc.*, 976 F. Supp. 532, 533 (N.D. Tex. 1997). A written transcript of the tape was prepared and read into the record at a regularly scheduled meeting of the Dallas school board. Peavy resigned from the board a short time later. Pet. App. 69a.

2. Proceedings in the District Court. The Peavys sued the Harmans on May 28, 1996. They filed a separate action against WFAA and Riggs on October 25, 1996. The suit against WFAA and Riggs alleged that defendants used and disclosed their private telephone conversations in violation of Title III and the Texas wiretap statute, Tex. Civ. Prac. & Rem. Code § 123.001, *et seq*. Plaintiffs also asserted common law claims for invasion of privacy, intentional infliction of emotional distress, and civil conspiracy. Pet. App. 69a.

On cross-motions for summary judgment, the district court, Chief Judge Buchmeyer, held that WFAA-TV and Riggs did not procure the Harmans to intercept the calls and did not conspire with the Harmans. Pet. App. 84a-86a, 108a-09a. However, the district court held that WFAA and Riggs intentionally "used" and "disclosed" the information on the Harman tapes in violation of Section 2511(1)(c) and (d) of Title III and in violation of the Texas wiretap statute. *Id.* at 87a-90a. The court rejected the defense that WFAA-TV and Riggs lacked the requisite intent

because they relied on the advice of legal counsel and law enforcement officials. *Id.* at 82a-83a.

Nonetheless, the district court held that the First Amendment precluded the imposition of liability. The court explained that "[t]he question is whether the First Amendment protects the media defendants in publishing truthful information acquired by the Harmans in violation of the federal and state wiretap statutes. The Court concludes that it does." Pet. App. 92a-93a.

The district court began its constitutional analysis by finding that WFAA and Riggs lawfully obtained truthful information about a matter of public significance. "[T]he media defendants did not seek out the Harmans or induce them to intercept the communications. The Harmans contacted WFAA with a story that was potentially newsworthy." Pet. App. 93a. "[I]t is not incumbent upon the media to determine whether information provided by a source has been derived through legal means. It would create an undue burden and hardship on the media and impede its ability to disseminate newsworthy information in a timely fashion. As long as a media defendant does not personally intercept a protected communication or procure another do so, any information acquired through legitimate newsgathering techniques is 'lawfully obtained.'" *Id.*

Next, the district court found that "[t]he facts of this case show that the information provided to the media defendants involved matters of public significance." Pet. App. 94a. "Peavy was an elected member of the Dallas school board and appointed Oliver as the exclusive agent to obtain insurance on behalf of the district. The contents of the intercepted communications suggest an arrangement between Peavy and Oliver to split commissions on insurance policies sold to DISD. Clearly, this kickback scheme is a matter of great public significance." *Id.* at 93a-94a.

The district court then held that "[t]he imposition of liability on the media defendants is not necessary to protect a state interest of the 'highest order.'" Pet. App. 94a (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989)). The court observed that the privacy claim asserted in this case was not a

constitutional right of privacy but rather an entitlement arising under federal and state wiretap statutes. "While such statutory rights are certainly important, they fare poorly against the constitutional rights of a free and unfettered press." Pet. App. 94a.

The district court proceeded to find that it was "obvious" in the context of this case that "punishing the media defendants for publishing the information will result in 'timidity and self-censorship.'" Pet. App. 95a (quoting *Florida Star*, 491 U.S. at 535). The district court opined that the judiciary "should be reluctant to punish the use of routine newsgathering techniques" such as those employed by WFAA in this case. *Id.* "[T]he tapes were not played over the air or referred to in broadcasts. The media defendants even attempted to determine whether the interceptions were legal. Their actions were consistent with those of a responsible journalist – to investigate leads, verify facts, and punish newsworthy information." *Id.* Accordingly, the district court held that Title III and the Texas wiretap statute were unconstitutional as applied to WFAA-TV and Riggs.[1]

3. The Court of Appeals' Decision. On appeal, the Fifth Circuit reversed.[2] The court of appeals extensively discussed the Third Circuit's decision in *Bartnicki v. Vopper*, 200 F.3d 109 (3d Cir. 1999), *cert. granted*, 120 S. Ct. 2716 (June 26, 2000) (Nos. 99-1687 and 99-1728), and the D.C. Circuit's decision in *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3686 (Apr. 25, 2000) (No. 99-1709). *See* Pet. App. 44a-48a. The court of appeals rejected the defense that WFAA and Riggs lacked the requisite scienter because they had acted in reliance on the advice of law enforcement officials and legal counsel. *Id.* at 31a. The Fifth Circuit determined that

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[1] The district court also dismissed the plaintiffs' common-law claims for invasion of privacy, and intentional infliction of emotional distress. Pet. App. 100a-107a. Plaintiffs did not appeal the dismissal of these claims.

[2] On appeal, the United States intervened to defend the constitutionality of Title III, pursuant to 28 U.S.C. § 2403(a) and FRAP 44. Pet. App. 8a.

neither the procedural posture of the case, nor any factual disputes between the parties, prevented the resolution of the First Amendment questions on the merits. *Id.* at 33a[3]

The Fifth Circuit acknowledged that Title III and the Texas wiretap statute, as applied to WFAA-TV and Riggs, triggered First Amendment scrutiny: "we conclude that the use and disclosure provisions, as applied to Riggs and WFAA, must satisfy 'the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech.'" Pet. App. 53a (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994)). The court of appeals rejected the argument by WFAA and Riggs that Title III and the Texas wiretap statute imposed a direct, rather than an incidental, prohibition on speech: "Defendants interpret too broadly what constitutes an 'incidental' effect." *Id.*

The Fifth Circuit held that the standards of intermediate scrutiny were satisfied. "[T]he United States and Texas have a substantial interest in protecting the confidentiality of private wire, oral, and electronic communications." Pet. App. 56a. The court of appeals also concluded that the interest "is unrelated to the suppression of free expression" because the statutes "do not prohibit use and disclosure of the information contained in illegal interceptions if such information is obtained from another source." *Id.* The Fifth Circuit held that the narrow tailoring requirement was met:

> Without the use and disclosure proscriptions, government's efforts to prohibit interception would be far

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[3] The Fifth Circuit noted that WFAA and Riggs had "some participation" concerning the interceptions, "such as Riggs advising the Harmans to record complete conversations." Pet. App. 32a, 50a. The Fifth Circuit opined that there was a question of material fact regarding whether WFAA and Riggs had "procured" or "obtained" the Harmans to make the interceptions, *id.* at 17a, but the court held that in any event there was no civil claim for "procurement" under 18 U.S.C. § 2520(a). Pet. App. 10a-13a.

> less effective, because a person who illegally intercepts a conversation and wishes to disclose it to the public can do so, at no risk to himself, by simply anonymously providing the contents of the communication -- by use of a tape or otherwise -- to third parties, such as the media, who have an interest in disclosing, or otherwise using, those contents (as in *Bartnicki*). Moreover, far greater damage to the interests sought to be protected results if, and when, such contents are paraded before the public through use and disclosure by non-interceptors, including the media.

Pet. App. 57a.

REASONS FOR GRANTING THE PETITION

I. THIS PETITION SHOULD BE HELD IN ABEYANCE PENDING THE DECISION IN *BARTNICKI*

This case presents the same constitutional question as *Bartnicki v. Vopper*, Nos. 99-1687 and 99-1728: Whether the imposition of civil liability under 18 U.S.C. § 2511(1)(c) and (d), and parallel state statutes, for using or disclosing the contents of illegally intercepted communications violates the First Amendment. This question is also presented in *McDermott v. Boehner*, No. 99-1709, a petition which this Court apparently is holding in abeyance pending the decision in *Bartnicki*. *See* Brief for the United States in *McDermott v. Boehner*, No. 99-1709 (May 2000) (recommending a "hold" pending disposition of *Bartnicki*).

The similarities between *Bartnicki* and this case make a "hold" appropriate here as well. In *Bartnicki*, the Third Circuit addressed Title III claims growing out of the illegal interception and recording of a telephone conversation between two representatives of a local teachers' union, Gloria Bartnicki and Anthony F. Kane. In that conversation, the two discussed

ongoing labor negotiations with the local school board. Those negotiations were highly contentious, and had been the subject of both public comment and extensive press coverage. Kane stated, with respect to the school district's leadership, "If they're not going to move for three percent [salary increase], we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys. . . . Yeh, well if the rules are off, the rules are off for us, too." 200 F.3d at 113.

The recording of the conversation was given anonymously to Jack Yocum, an individual who was opposed to the union's bargaining proposals. Yocum gave the recording to Frederick Vopper, the host of a local radio show. Vopper, in turn, played the recording during his show, which was broadcast by two radio stations. Bartnicki and Kane brought suit against media defendants (Vopper and the two radio stations), and a non-media defendant (Yocum), alleging violations of Section 2511(1)(c) and Section 2511(1)(d). The district court denied a motion by the defendants for summary judgment on First Amendment grounds, but the Third Circuit reversed. The court of appeals held that Section 2511(1)(c) and Section 2511(1)(d), as well as the corresponding state statute, violated the First Amendment as applied to the media defendants in that case. 200 F.3d at 129.

This case and *Bartnicki* thus present the same First Amendment issue. The Fifth Circuit's opinion below contains an extensive analysis of *Bartnicki*. *See* Pet. App. 44a-48a. Indeed, the merits briefs for the United States and for the private petitioners in *Barnicki* rely on the Fifth Circuit's decision in the instant case. *See* Brief for the United States in Nos. 99-1687 and 99-1728, at 17 n.6 (arguing that "both the D.C. Circuit [in *Boehner*] and the Fifth Circuit [in this case] went on to find Title III's restrictions constitutional as applied to the facts of those cases"); Brief for Bartnicki and Kane in Nos. 99-1687 and 99-1728, at 45 (quoting at length from the Fifth Circuit's decision in this case).

This petition should be held pending the decision in *Bartnicki*

even though the Fifth Circuit identified possible factual questions surrounding the application of Section 2511(1)(c) and Section 2511(1)(d) in this case. The Fifth Circuit opined that WFAA and Riggs had engaged in "some participation" concerning the interceptions, "such as Riggs advising the Harmans to record complete conversations." Pet. App. 32a, 50a. The Fifth Circuit also asserted that there was a question of material fact – which the court of appeals itself did not resolve – regarding whether WFAA and Riggs had "procured" or "obtained" the Harmans to make the interceptions. *Id.* at 17a.

Notably, however, the Fifth Circuit held that none of those factual issues prevented it from addressing the First Amendment question on the merits. Pet. App. 33a. The court of appeals declined to wait until the factual issues were resolved by the district court because "further evidence is not needed" (in the Fifth Circuit's view) to "uphold[] the constitutionality of the 'use' and 'disclosure' provisions of the Federal and Texas Acts." *Id.* The Fifth Circuit explained that, "if we remanded the constitutional issue for trial (further evidence), in an attempt to avoid reaching it, our reaching it would probably simply be delayed, instead, and at great cost in time and expense to the parties and district court. Because of the summary judgment posture of this case, such avoidance of the constitutional issue at this stage would not be prudential." *Id.*

Just as the Fifth Circuit was able to decide the First Amendment question on the extant record of this case, this Court will also be able to reach the constitutional issue here. Any differences between the underlying facts of this case and those in *Bartnicki* do not bear on the constitutional analysis. Of course, even if the factual issues identified by the Fifth Circuit were relevant to the ultimate disposition of this case, a "hold" would still be appropriate so that this Court's decision in *Bartnicki* articulating the governing First Amendment standard could be properly applied in this case, after whatever additional factfinding was warranted.

Tellingly, the United States has requested this Court to hold

the petition in *Boehner* even though that case also raises questions of the role of the defendant in the interception of the telephone conversation at issue. *Boehner* involves the imposition of liability not on a media defendant but solely on a person (Representative McDermott) who received a tape of an intercepted call and provided copies of the tape to The NewYork Times and other newspapers. The D.C. Circuit opined: "By accepting the tape from the Martins, McDermott participated in their illegal conduct. That transaction may have involved a quid pro quo. When they transmitted the tape to McDermott, the Martins expressed their understanding that they would be receiving immunity for their illegal conduct. The inference is that someone promised this in return for the tape. Who? The obvious candidate is McDermott, or someone acting in concert with him." 191 F.3d at 476. The Third Circuit similarly observed in *Bartnicki* that "McDermott was more than merely an innocent conduit. Indeed, McDermott . . . knew who intercepted the conversation because he 'accepted' the tape from the interceptors and, the opinion suggests, not only sought to embarrass his political opponents with the tape but also promised the interceptors immunity for their illegal conduct." 200 F.3d at 128.

Despite the factual issues surrounding McDermott's role, the United States has described *Boehner* as presenting "a virtually identical First Amendment challenge" to the claim in *Bartnicki*. Brief for the United States in *McDermott v. Boehner*, No. 99-1709 (May 2000). The United States has taken the view that it "is difficult to reconcile [*Boehner*] with the decision in *Bartnicki*"; that *Boehner* "and the *Bartnicki* case present similar challenges to Title III"; and that, "[a]lthough the underlying facts of the two cases plainly differ, the cases do not differ in ways that appear to bear on the constitutional analysis." *Id.* Equivalent statements could be made about the similarity between this case and *Bartnicki*.

The petitioners' *amici* in *Bartnicki* take the view that "the holdings of *Peavy* and *Boehner* apply with equal force here,

because liability for unauthorized disclosure and use under ECPA does not depend on participation in the underlying illegal interception." Brief *Amicus Curiae* of the Cellular Telecommunications Industry Assn. in Support of Petitioners in *Bartnicki v. Vopper*, Nos. 99-1687, 99-1728, at 15 n.24.

Accordingly, the petition in the instant case should be held in abeyance pending the decision in *Bartnicki*.

II. IN ADDITION TO THE FIRST AMENDMENT QUESTION, TIIIS CASE PRESENTS A SEPARATE ISSUE MERITING THIS COURT'S PLENARY REVIEW

In addition to the First Amendment issue, this case presents a separate question warranting this Court's plenary review: Whether the imposition of liability under 18 U.S.C. § 2511(1)(c) and (d) requires a showing that the defendant "know[s] or ha[s] reason to know that the information was obtained . . . in violation of this subsection."

The district court in this case found that, on December 9, 1994, Harman assured WFAA and Riggs that the lawfulness of his actions had been confirmed by the Dallas County District Attorney and the Dallas Police Department. Pet. App. 67a. The district court also found that Paul Watler, WFAA's legal counsel, advised News Director John Miller that WFAA-TV could accept and broadcast the tapes. This advice was confirmed in a written legal memorandum dated January 4, 1995. *Id.* As soon as WFAA and Riggs learned that the interceptions were unlawful, they stopped accepting tapes from Harman, returned the original tapes to him, and transferred all copies of the tapes and related documents to their attorney for safekeeping. *Id.* at 67a-68a. The district court commended WFAA and Riggs for "attempt[ing] to determine whether the interceptions were legal. Their actions were consistent with those of a responsible journalist – to investigate leads, verify facts, and publish newsworthy information. To require anything more would undoubtedly result

in 'timidity and self-censorship.'" *Id.* at 95a.

Nonetheless, both the district court and the Fifth Circuit in this case held that WFAA and Riggs could not assert a defense based on the advice they received from the government and from their attorney. Pet. App. 31a, 82a-83a. The Fifth Circuit held that the scienter requirement of Section 2511(1)(c) and Section 2511(1)(d) may be satisfied by proof that "(1) the information used or disclosed came from an intercepted communication, and (2) sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited in light of [Title III]." *Id.* at 30a (internal quotation omitted).

This Court should grant review of the Fifth Circuit's interpretation of the scienter requirement of Section 2511(1)(c) and Section 2511(1)(d). The statutory language setting forth the scienter requirement is not a model of clarity. The requisite intent is defined as "knowing or having reason to know" that the information in question "was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. § 2511(1)(c), (d).[4]

The Fifth Circuit interpreted the scienter language as requiring a showing that: (a) the defendant knew, or had reason to know, that the information "was obtained through the interception of a wire, oral, or electronic communication," and

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[4] *See* W. LaFave & A. Scott, Criminal Law § 27 (1972) ("What, for instance, does 'knowingly' modify in a sentence from a 'blue sky' law criminal statute punishing one who 'knowingly sells a security without a permit' from the securities commissioner? To be guilty must the seller of a security without a permit know only that what he is doing constitutes a sale, or must he also know that the thing he sells is a security, or must he also know that he has no permit to sell the security he sells? As a matter of grammar the statute is ambiguous; it is not at all clear how far down the sentence the word 'knowingly' is intended to travel – whether it modifies 'sells,' or 'sells a security,' or 'sells a security without a permit.'") (quoted with approval in *Liparota v. United States*, 471 U.S. 419, 424 n.7 (1985)).

(b) the defendant knew, or had reason to know, sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited by Title III. Pet. App. 30a.

This holding was in error and merits this Court's plenary review. It may be permissible as an initial matter to presume a defendant's knowledge of the Title III legal requirements. But the scienter requirement should be interpreted as allowing the defendant to negate any presumption that he was aware of the Title III prohibition by demonstrating that he reasonably relied on advice from law enforcement authorities, legal counsel, or similarly authoritative sources of information. Such evidence should properly be treated as exculpating the defendant from liability by demonstrating that he did not know, or have reason to know, that the interception was illegal. This construction is more faithful to the statutory language enacted by Congress because it gives meaning to the decision to place the phrase "in violation of this subsection" after the verb "know[s] or ha[s] reason to know[]." By any common sense understanding, a defendant like WFAA or Riggs who has been advised of the lawfulness of conduct by local police, the district attorney, and his own attorney has no "reason to know" that the conduct violates Title III.

By contrast, the Fifth Circuit's interpretation draws an arbitrary line between the defendant's knowledge of underlying facts relevant to lawfulness (regarding which a defendant may put on evidence) and the defendants' reasonable understanding of the legal standard established by Section 2511(1)(c) and Section 2511(1)(d) (regarding which a defendant may not offer proof, according to the Fifth Circuit). Yet the statutory language draws no distinction whatsoever between these two categories. Section 2511(1)(c) and Section 2511(1)(d) refer to whether a defendant "know[s] or ha[s] reason to know that the information was obtained . . . in violation of this subsection." The statute does not differentiate between knowledge of underlying facts relevant to lawfulness and knowledge of the governing legal

standard.

Further, the Fifth Circuit's interpretation is intrinsically unreasonable. It would permit liability to be imposed even if the defendant has been assured in writing by the Attorney General herself that the interception in question is entirely lawful under Section 2511. Such a scenario is no different in principle from what happened in this case, where Harman relayed to WFAA and Riggs the reassurances of the Dallas County District Attorney and the Dallas Police Department that the taping was lawful. Pet. App. 67a.[5]

The district court found that WFAA and Riggs "attempted to determine whether the interceptions were legal. Their actions were consistent with those of a responsible journalist – to investigate leads, verify facts, and publish newsworthy information." Pet. App. 95a. There is every reason to think that WFAA and Riggs would have acted differently had they received accurate legal advice. Indeed, as soon as they learned that the interceptions were illegal, they returned the original tapes to Harman and did not accept any additional tapes. *Id.* at 67a-68a.

To impose liability in these circumstances raises serious constitutional questions. This Court has held that it runs afoul of due process to punish "a citizen for exercising a privilege which the State clearly had told him was available to him." *Raley v. Ohio*, 360 U.S. 423, 438 (1959); *see also Lambert v. California*, 355 U.S. 225, 227 (1957) (Los Angeles ordinance requiring felons to register their presence in the city "violates due process where it is applied to a person who has no actual knowledge of his duty to register").

This principle is underscored by the First Amendment rights at stake. If the press cannot rely on authoritative legal advice to

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[5] Even if the difference between advice from the U.S. Department of Justice and from state law enforcement authorities were thought to be significant, the possibility of liability even where the Attorney General herself has advised of the lawfulness of the interception illustrates the defect in the Fifth Circuit's construction.

confirm the permissibility of traditional methods of newsgathering, there will be an unacceptable risk of chill, timidity, and self-censorship.

The United States has recognized as much in *Bartnicki*. There, the Solicitor General has maintained that Title III's restrictions on use and disclosure do not impermissibly chill protected speech precisely because "the prohibitions in Sections 2511(1)(c) and (d) are violated only when a defendant 'know[s] ha[s] reason to know' that the communication was intercepted *in violation of Title III*." Brief of the United States in Nos. 99-1687 and 99-1728, at 45 (emphasis added). "That scienter requirement is demanding." *Id.* "It imposes no duty of inquiry on a person to ferret out the provenance of the information." *Id.* at 15. "[U]nless a person actually possesses information from which he or a reasonable person would infer that the communication was unlawfully intercepted, liability cannot attach." *Id.* at 46. In this case, the advice of law enforcement officials and legal counsel, as well as other information available to WFAA-TV and Riggs, was that the communications had *not* been unlawfully intercepted.

Further, the United States has urged in *Bartnicki* that, to the extent any residual concerns remain regarding the chilling effect of the challenged provisions, "those concerns could be addressed by procedural measures that stop short of invalidating the provisions themselves." *Id.* One of the most obvious means of reducing the possibility of a chilling effect would be to adopt a rule that a defendant can demonstrate lack of the requisite scienter by showing that he held a reasonable, good faith view based on advice from law enforcement authorities, legal counsel, or similar sources that his actions were not unlawful under Title III. In addition, the United States has invited this Court to adopt an elevated proof requirement for scienter in civil cases, in the form of a standard of "clear and convincing" evidence. *Id.*; *see United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68-69 (1994) (rejecting "[t]he most natural grammatical reading" of scienter provision in order to create additional defense to avoid

First Amendment issue).

The Fifth Circuit asserted that accepting petitioner's argument would amount to judicial creation of a "mistake of law" defense. Pet. App. 30a. That is inaccurate. A "mistake of law" defense is a claim that a defendant's subjective belief in the lawfulness of his conduct excuses a legal violation. Here, defendants' state of mind as to the legality of their conduct bears directly on whether they possessed the requisite scienter under the statute. The issue is a matter of statutory construction of Section 2511, informed by due process and First Amendment principles. As the commentary to the Model Penal Code explains, "The general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of the offense include a legal element." Model Penal Code § 2.02, comment 11 at p.131 (Tent. Draft No. 4, 1955).

This Court has endorsed a similar approach in other contexts. In *Liparota v. United States*, 471 U.S. 419 (1985), for example, this Court held that a federal statute relating to food stamp fraud (7 U.S.C. § 2024(b)) required proof that the defendant knew his conduct to be unauthorized by the applicable statute or regulations. The relevant provision punished any person who "knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized [by statute] or the regulations." 471 U.S. at 420. The government argued that the term "knowingly" modified only the "use, transfer, acquisition, alteration, or possession" of the food stamps and that the government was not required to prove that the defendant was aware that such use, transfer, acquisition, alteration or possession also violated the law. This Court rejected the government's argument, holding that "§ 2024(b)(1) requires a showing that the defendant knew his conduct to be unauthorized by statute or regulations." *Id.* at 425.

Similarly, in *Morissette v. United States*, 342 U.S. 246 (1952), this Court held that it is a defense to a charge of "knowingly converting" federal property that one did not know

that what one was doing was a conversion. This Court explained that, under English common law, criminal culpability generally arose only "from concurrence of an evil-meaning mind with an evil-doing hand." *Id.* at 251. In *Staples v. United States*, 511 U.S. 600 (1994), this Court held that, to be criminally liable under 26 U.S.C. § 5861(d), a defendant must know that his weapon possessed automatic firing capability so as to make it a machinegun as defined by the National Firearms Act. "*Morissette*, reinforced by *Staples*, instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994).

Numerous lower courts have also rendered decisions inconsistent with the judgment below. In *Davis v. Zirkelbach*, 149 F.3d 614, 620 (7th Cir. 1998), for example, the Seventh Circuit held that law enforcement officers were entitled to qualified immunity because an attorney's advice regarding the use of illegally intercepted communications negated any inference that the officers knew or should have known of the relevant legal standard. In *Kratz v. Kratz*, 477 F. Supp. 463, 477 (E.D. Pa. 1979), the court held that a defendant had raised an issue of material fact regarding whether an attorney and client had reason to know of the illegality of interceptions where the attorney had, after legal research, advised the client that the interceptions were lawful. *See also United States v. Speach*, 968 F.2d 795, 796 (9th Cir. 1992) (RCRA statute, which punishes person who "knowingly transports or causes to be transported any hazardous waste . . . to a facility which does not have a permit," requires proof of knowledge that defendant knew facility lacked valid permit: "Removing the knowledge requirement would criminalize innocent conduct, such as that of a transporter who relied in good faith upon a recipient's fraudulent certificate."); *United States v. Hayes International Corp.*, 786 F.2d 1499, 1503-05 (11th Cir. 1986) (same); *United States v. Golitschek*, 808 F.2d 195, 202 (2nd Cir. 1986) (reversing conviction under Arms Export Control Act because

the statutory "state of mind includes knowledge of a legal requirement" on which jury was not instructed); *United States v. Davis*, 583 F.2d 190, 192-99 (5th Cir. 1978) (court's instructions that every person is presumed to know the law and that ignorance of the law is no excuse were inconsistent with element requiring proof that "defendant voluntarily and intentionally violated a known legal duty"); *United States v. Granda*, 565 F.2d 922, 926 (5th Cir. 1978) ("[T]he defendant's alleged ignorance of the reporting requirements goes to the heart of his or her denial of the specific intent necessary to commit the crime.").[6]

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[6] *Compare Reynolds v. Spears*, 93 F.3d 428, 435-36 (8th Cir. 1996) (defendant's reliance on incorrect advice from law enforcement officer not a defense to liability under Title III); *Williams v. Poulos*, 11 F.3d 271, 285 (1st Cir. 1993) (no defense where defendant mistakenly believed use and disclosure authorized by statute); *Thompson v. Dulaney*, 970 F.2d 744, 749 (10th Cir. 1992) ("defendant may be presumed to know the law"); *Heggy v. Heggy*, 944 F.2d 1537, 1541 (10th Cir. 1991) (rejecting "good faith" defense to Title III based upon mistake of law), *cert. denied*, 503 U.S. 951 (1992); *United States v. McIntyre*, 582 F.2d 1221, 1224-25 (9th Cir. 1978) (rejecting contention that interception was not "willful" because defendants believed in good faith, based on advice from a law enforcement communications technician, that their conduct was legitimate).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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October 30, 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-10272

CARVER DAN PEAVY; SALLY PEAVY,
Plaintiffs-Appellants/Cross-Appellees,

v.

WFAA-TV, INC., ROBERT RIGGS,
Defendants-Appellees/Cross-Appellants.

Appeals from the United States District Court
for the Northern District of Texas

July 31, 2000

Before POLITZ, JOLLY, and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

Primarily at issue is whether the First Amendment shields WFAA-TV, Inc., and its reporter, Robert Riggs, from liability for their "use" and "disclosure," in violation of the Federal and Texas Wiretap Acts, of the contents of the Peavys' cordless telephone conversations, illegally intercepted and recorded by the Harmans, with them providing the recordings to Riggs and with Riggs and WFAA having some participation concerning the interceptions, at least as to their extent. Numerous other federal and state law issues are presented, including whether defendants "procured" or "obtained" the Harmans to make the interceptions, in violation of the Federal and Texas Acts, respectively, and whether the Federal Act even permits a civil action for damages for such "procurement." The district court granted summary

judgment for WFAA and Riggs, holding, inter alia: the Harmans were neither so "procured" nor "obtained"; and even though defendants engaged in proscribed "use" and "disclosure", the First Amendment trumps the two Acts. We AFFIRM in part; REVERSE in part; VACATE in part; and REMAND.

I.

The facts are largely undisputed. The following is drawn, in part, from the magistrate judge's recommendation, adopted by the district court without a separate opinion. *Peavy v. Harman*, 37 F. Supp. 2d 495, 502-04 (N.D. Tex. 1999).

Carver Dan Peavy (Peavy) was elected a trustee for the Dallas Independent School District (DISD) in 1986, so serving until 1995. By the early 1990s, he controlled purchases of insurance for DISD employees. He was a friend and business associate of Eugene Oliver, an insurance agent who had been convicted as an accomplice to murder. The Peavys had been long involved in various, ongoing disputes with their neighbors, Charles and Wilma Harman. *Id.* at 502 n.2.

In early December 1994, Charles Harman (Harman) acquired a police scanner, in order to monitor police activity in his neighborhood. The first time he turned it on, he overheard a telephone conversation between Peavy and another neighbor, in which they discussed filing a class action against the Harmans. *Id.* at 502. Thereafter, Harman locked the scanner onto the frequency for the Peavys' cordless telephone, and continued listening to their conversations. Harman overheard conversations which he interpreted as threats to his safety, and some involved what he perceived to be public corruption on the part of Peavy involving insurance at DISD. *Id.* Shortly thereafter, Harman began recording the intercepted conversations. *Id.*

The Harmans claimed to have consulted with various law enforcement officials regarding the legality of intercepting and recording cordless telephone calls, and to have been told it was legal. *Id.* (However, in a related proceeding, subsequent to the

summary judgment in this case, the magistrate judge found that no one told the Harmans such interception was legal. *See Goodspeed v. Harman*, 39 F. Supp. 2d 787, 793-94 (N.D. Tex. 1999).)

Frustrated at the lack of police response to his reports of Peavy's threats and public corruption, Harman contacted WFAA on 8 December 1994, and spoke with one of its producers, P. J. Ward. *Id.* 37 F. Supp. 2d 495 at 503. Harman told Ward he had information about possible corruption by an elected official, who he eventually identified as Peavy. *Id.* Ward relayed the tip to Riggs, a WFAA investigative reporter. *Id.*

Riggs telephoned Harman that afternoon. *Id.* Harman told Riggs he had proof Peavy was threatening to harm him and was involved in an insurance kickback scheme; was concerned for his family's safety; and wanted to talk to Riggs in person. *Id.* Riggs had never heard of Peavy and was *not* working on a story about DISD insurance.

The next day, Riggs went to the Harmans' home. *Id.* They told him about their history with Peavy; hearing, with a police scanner, his threats and discussions of insurance kickbacks; and taping his conversations. They told Riggs about the contents of overheard, but *not* recorded, conversations; played a tape of recorded conversations; and showed him the scanner. Riggs knew the parties to those conversations were *not* aware of, and did *not* consent to, the interception and recording.

Riggs claimed: he asked Harman, at their initial meeting, whether it was legal to record the conversations; and Harman assured him his actions had been approved by the Dallas County District Attorney and the Dallas Police Department. *Id.* On the other hand, the Harmans claim Riggs told them he had consulted with WFAA's attorney about the legality of the intercepts *prior* to their meeting. Riggs denied then consulting counsel and stated he did *not* do so until a few days later.

At their initial meeting, Harman asked Riggs whether he wanted a copy of the tape, as well as others he (Harman) might make in the future. *Id.* Riggs replied he did. *Id.* He also

instructed the Harmans *not* to turn the tape recorder on and off while recording intercepted conversations, and *not* to edit them, so that the tapes' authenticity could *not* be challenged. *Id.*

Riggs took the tape of the intercepted conversations to WFAA; met with Ward and WFAA News Director John Miller; told them about his meeting with the Harmans; and played portions of the tape for them. *Id.* They agreed Peavy's activities should be investigated. *Id.* After that meeting, Riggs asked another WFAA employee to conduct research regarding the contents of the tape, and instructed Ward to conduct other research at DISD.

WFAA asked its outside legal counsel, Paul Watler, whether it was lawful for WFAA to receive tapes of the intercepted and recorded *cordless* telephone conversations. At a meeting with Riggs and Miller on 12 December 1994, Watler advised he would have to double-check, but thought it legal to intercept and record *cordless* telephone conversations. At a meeting at WFAA on 4 January 1995, Watler told Riggs: it was legal to listen to, and record, cordless telephone conversations; and WFAA could *legally* accept and broadcast the tapes.

In February 1995, Ward and Watler decided to have portions of the tapes transcribed. Ward selected for transcription those portions she believed would illustrate to Riggs, Miller, and Watler the evidence of public corruption and racial discrimination. At Watler's suggestion, Ward had them transcribed by a court reporter in Austin, Texas, and took measures to ensure the confidentiality of the tapes and transcripts.

After the transcript was prepared, Ward made copies for Miller, Riggs, and Watler. Ward and Riggs reviewed, edited, and corrected it. Watler reviewed it to familiarize himself with the contents of the tapes so that he could advise WFAA on legal questions that might arise. And, Riggs gave a copy of the transcript to the Harmans to review for accuracy.

In late February, Riggs began preparing a memorandum in which he formulated story outlines based on the contents of the

tapes and his investigation of those contents.

By the end of that month, the Harmans had provided to WFAA 17 more tapes of the Peavys' conversations. *Id.* Ward listened to, and took notes about, each tape. At Miller's request, Ward prepared a memorandum regarding the persons, and another regarding the topics, mentioned on the tapes.

The 18 tapes WFAA received from Harman contained 188 telephone conversations between the Peavys and others. *Id.* Because the contents of those conversations are *not* particularly relevant to the issues at hand, it is *not* necessary to describe them in detail. Generally, they concern DISD insurance and Peavy's conduct as a DISD trustee, a plan to sell cancer insurance to an entity other than DISD, and Peavy's relationship with Oliver. They also include offensive language, as well as conversations about intensely personal matters which the participants obviously would never have discussed had they known of the interceptions.

By late February 1995, Riggs had been informed by law enforcement sources for another story on which he was working that the Federal Wiretap Act had been amended to cover interception of *cordless* telephone calls. *Id.* Accordingly, he asked Watler to re-check his previous advice regarding the legality of using the intercepted conversations. *Id.* At WFAA's request, Watler conducted further research and discovered that the law had been amended in October 1994 (about six weeks before the first Riggs-Harman meeting), to make it unlawful to intercept the radio portion of a cordless telephone call. *Id.* Pub. L. No. 103-414, § 202(a)(1), 108 Stat. 4290, 4291 (codified as amended at 18 U.S.C. § 2510(1) (deleting from definition of "wire communication" provision which *excluded* radio portion of cordless telephone communication that is transmitted between handset and base unit)).

Watler immediately informed Miller of the amendment and advised WFAA *not* to accept any more tapes. On 1 March, Watler met with Miller and Riggs and advised them his previous advice had been incorrect. He opined that, in any event, the First Amendment took precedence over the wiretapping laws and that

WFAA could still use, and broadcast (disclose), the tapes, because it had *lawfully* obtained them. Nevertheless, he advised WFAA that the more conservative approach was *not* to accept additional tapes, *not* to broadcast any tapes, *not* to disclose the contents of the tapes to third parties, and *not* to confront individuals about conversations on the tapes, unless the same information was available from other sources.

In addition, Watler advised WFAA to return the original tapes to Harman and tell him WFAA would not accept any more. He also advised WFAA to provide him with all copies of the tapes, transcripts, and other materials related to the tapes' contents.

Ward forwarded the materials (except for her copy of the transcript, which she inadvertently did not include) to Watler. The tapes WFAA had received from Harman were returned to him by either Riggs or Ward on or about 1 March. 37 F. Supp. 2d at 504.

Even after learning recording Peavy's conversations was illegal, Harman continued to intercept them until his scanner was seized by the FBI in October 1995. *Id.* Harman told Riggs about the contents of at least one of these interceptions. He also recorded at least one other, for which he pleaded guilty to violating the Federal Wiretap Act and paid a $ 5,000 fine. *Id.*

At the earlier described 1 March meeting with Miller and Riggs, Watler also advised WFAA could continue to research Peavy and DISD insurance using other means. Riggs and Ward continued their extensive investigation of Peavy and Oliver, such as requesting records from DISD and other governmental agencies; interviewing numerous individuals; investigating DISD's insurance providers; conducting background research and checks on Peavy and others; and reviewing past DISD campaign contributions, board and committee minutes, and insurance proposals.

Between 31 July and 2 August 1995, WFAA broadcast three reports on Peavy's alleged wrongdoing in connection with DISD insurance. *Id.* Although intercepted conversations were not played in the broadcasts, the district court held that, in violation

of the Federal and Texas Wiretap Acts, WFAA and Riggs "disclosed" portions of the tapes' contents during them. *Id.* at 514. After 2 August, WFAA periodically broadcast follow-up reports on Peavy, Oliver, and DISD insurance. Watler reviewed the broadcasts before they aired.

After Riggs learned of the illegality of the interceptions, he disclosed to federal law enforcement officials and a Dallas Police detective (apparently in August 1995) the tapes' contents and other information from his investigation. Riggs then advised the Harmans about those discussions.

In April 1996, Peavy and Oliver were indicted for bribery and other offenses related to DISD insurance. *Id.* at 504. They were acquitted of all charges. *Id.*

In October 1996, the Peavys filed this action against WFAA and Riggs, claiming violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C. §§ 2510-2521, as amended by the Electronic Communications Privacy Act of 1986 (Federal Wiretap Act); as well as making state law claims under TEX. CIV. PRAC. & REM. CODE § 123.001, et seq. (Texas Wiretap Act) and for, inter alia, civil conspiracy. Separate actions filed by the Olivers against WFAA, Riggs, and Harman, and by the Peavys against the Harmans, were consolidated for pretrial purposes. 37 F. Supp. 2d at 504 n.6.

Cross-motions for summary judgment were referred to the magistrate judge. *Id.* at 502. His October 1998 recommendation was, inter alia: WFAA and Riggs violated the Federal and Texas Wiretap Acts by "using" and "disclosing" contents of illegal interceptions, *id.* at 513-15, but they should be awarded summary judgment because liability for their proscribed conduct would violate the First Amendment. *Id.* at 518. Summary judgment was also recommended for WFAA and Riggs on the Peavys' other state law claims. *Id.* at 521-25. The district court adopted the recommendation. *Id.* at 501.

II.

The Peavys claim the district court erred by: holding defendants did not "procure" the interceptions by the Harmans, in violation of the Federal Act, or "obtain" them, in violation of the Texas Act; granting summary judgment against their civil conspiracy claims; applying strict scrutiny and, as a result, holding that the First Amendment shields WFAA and Riggs from liability under the "use" and "disclosure" provisions of the two Wiretap Acts; and denying their motion to suppress the contents of the illegal interceptions.

By cross-appeal, WFAA and Riggs (defendants) contest the holding they engaged in proscribed "use" and "disclosure". Alternatively, they claim the Wiretap Acts are facially unconstitutional for vagueness and overbreadth.

The United States intervened on appeal, pursuant to 28 U.S.C. § 2403(a) and FED. R. APP. P. 44, to defend the constitutionality of the Federal Wiretap Act. And, an amicus brief was filed by numerous media entities, such as the National Broadcasting Company, Inc.

We review the summary judgment de novo, using "the same criteria as the district court, viewing all facts, and the inferences to be drawn from them, in the light most favorable to the non-movants." *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994). The judgment is proper if, in the light of the summary judgment record, "'there is no genuine issue as to any material fact and ... the movant is entitled to a judgment as a matter of law.'" *Id.* (quoting FED. R. CIV. P. 56(c)).

"The substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude ... summary judgment." *Id.* "[A] dispute about a material fact is 'genuine' ... if the evidence is such that a reasonable jury could return a verdict for the nonmovant." *Id.*

A.

The Federal Wiretap Act is violated if a person, inter alia, "*procures any other person* to intercept ... any wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a) (emphasis added). Under the Texas Wiretap Act, "[a] party to a communication may sue a person who ... [, inter alia,] *obtains another* to intercept ... the communication." TEX. CIV. PRAC. & REM. CODE § 123.002(a)(1) (emphasis added).

The district court held defendants neither "procured," in violation of the Federal Act, nor "obtained," in violation of the Texas Act, the Harmans to intercept the Peavys' communications, because the Harmans made an independent decision in which defendants did not actively participate. *Peavy*, 37 F. Supp. 2d at 512-13.

1.

Defendants urge us to affirm the summary judgment on the ground, not addressed by the district court, that the Peavys did not timely plead a "procures" or "obtains" claim. They maintain the former was not raised until in opposition to summary judgment; the latter, until in objections to the recommendation.

"A pleading which sets forth a claim for relief ... shall contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a). "The form of the complaint is not significant if it alleges facts upon which relief can be granted, even if it fails to categorize correctly the legal theory giving rise to the claim." *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 604 (5th Cir. 1981).

The amended complaint stated, inter alia, that defendants conspired with the Harmans "to intercept" the Peavys' communications, "knowing or having reason to know" the contents were obtained through interception in violation of, inter alia, " 18 U.S.C. § 2511 and/or Chap. 123, TEX. CIV. PRAC. & REM. CODE." "Procuring" and "obtaining" claims are stated.

2.

Alternatively, for the federal "procures" claim, defendants urge affirming summary judgment on the ground there is no private civil action for violation of that portion of § 2511(1)(a).

a.

The Peavys contend, incorrectly, that defendants "waived" this issue by not presenting it in district court. Although the magistrate judge and district judge did not address this no-civil-action issue, defendants did raise it in response to the Peavys' objections to the recommendation.

Even assuming the issue was not properly raised, we may consider a "purely legal claim" advanced for the first time on appeal, to support affirmance of a summary judgment, when "there are no countervailing reasons warranting remand to the district court." *See F.D.I.C. v. Lee*, 130 F.3d 1139, 1141-43 (5th Cir. 1997) (affirming summary judgment on statutory ground raised by appellee for first time on appeal).

Whether the Federal Act authorizes a private civil action for procurement is a legal issue of statutory interpretation, which requires no presentation of evidence. Because the issue has been fully briefed, and the Peavys cannot claim prejudice, there are no "countervailing reasons" to preclude our considering it.

b.

Defendants did not cite, nor have we found, any cases addressing the availability, under the Federal Act, of a civil procurement action. Prior to its amendment in 1986, the provision authorizing civil damages stated, in pertinent part:

> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person

> who intercepts, discloses, or uses, *or procures any other person to intercept, disclose, or use such communications*, and (2) be entitled to recover from any such person [damages, attorney's fees, and costs].

18 U.S.C. § 2520 (1970) (emphasis added).

But, the "or procures any other person" language was deleted when the section was amended in 1986. *See Oceanic Cablevision, Inc. v. M.D. Elecs.*, 771 F. Supp. 1019, 1027 (D. Neb. 1991) ("section 103 of the Electronic Communications Privacy Act of 1986[] amended § 2520 by eliminating the 'or procures another person' language of the statute and incorporating violations involving the interception, disclosure, or intentional use of electronic communications" (citing S. Rep. No. 541, 99th Cong., 2d Sess. 26-27, reprinted in 1986 U.S.C.C.A.N. 3555, 3580-81)).

As amended, § 2520 provides, in pertinent part, that

> any person whose wire, oral, or electronic communication is *intercepted, disclosed, or intentionally used* in violation of this chapter may in a civil action recover from the *person or entity which engaged in that violation* such relief as may be appropriate.

18 U.S.C. § 2520(a) (Supp. 2000) (emphasis added). Nevertheless, § 2511(1)(a) continues to proscribe procuring another to intercept covered communications.

In short, the class of persons who may bring a civil action for violation of the Act is the same in both the original and amended provisions: those with covered communications "intercepted, disclosed, or used" in violation of the Act. But, those who may be held civilly liable are not the same. The amended provision does not have the "procures any other person" language, extending civil liability to "the person or entity which engaged in *that violation*," 18 U.S.C. § 2520(a) (Supp. 2000) (emphasis added). And, the referenced "violation" is "intercepted, disclosed,

or intentionally used"; there is no mention of "procures."

"When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone v. I.N.S.*, 514 U.S. 386, 397 (1995). The Peavys counter that the amendment did not take away an action for procurement, because the § 2520(a) class of potential defendants is broad enough to cover persons who violate the Federal Act by procuring another to intercept; and the legislative history of the amendment does not indicate any intent to eliminate a civil claim for procurement.

We disagree. Section 2520(a)'s plain, unambiguous language authorizes a civil action by one whose covered "communication is *intercepted, disclosed, or intentionally used in violation of this chapter,*" from "the person or entity *which engaged in that violation.*" 18 U.S.C. § 2520(a) (Supp. 2000) (emphasis added). "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). Restated, we must assume Congress meant what it said in the amendment. Accordingly, "that violation" refers only to illegal interception, disclosure, or use, and not to procuring interception by another.

This interpretation of § 2520(a) does not render superfluous the portion of § 2511(1)(a) prohibiting "procuring"; as noted, that proscription can be enforced through, inter alia, a criminal proceeding. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) ("it is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another" (brackets, internal quotation marks, and citation omitted)).

Because the plain language of the statute is unambiguous, resort to legislative history for its interpretation is not necessary. *See Andrews & Kurth L.L.P. v. Family Snacks, Inc. (Matter of Pro-Snax Distribs., Inc.)*, 157 F.3d 414, 425 (5th Cir. 1998). Moreover, even if the legislative history is silent regarding Congress' intent, in the 1986 amendment, to take away a civil

action for procurement, that silence does not make the amended statute ambiguous. If Congress intended to retain the action, it failed to express that intent. *See id.* (where language in statute was deleted in amendment, absence of legislative history did not render statute ambiguous; even if Congress intended to leave language intact, such intent was not reflected in unambiguous, amended statute).

Obviously, if Congress did not intend to delete a civil procurement action, it can amend § 2520(a). But, it goes without saying that we cannot do so. The federal procurement claim was properly dismissed.

c.

But, even though there is no federal civil liability for "procurement", such activity, as noted, is nevertheless unlawful, pursuant to § 2511(1)(a). Accordingly, it may well be that procurement vel non remains an issue for trial. For example, for damages purposes, procurement vel non may bear on the extent of defendants' knowledge of the Harmans' illegal interceptions.

The following section concerning the Peavys' "obtains" claim under the Texas Act is intertwined with procurement vel non under the Federal Act. For the reasons stated in that section, we hold, contrary to the district court, that there is a material fact issue on procurement.

3.

For the Texas Act, the Peavys contend they are entitled to judgment as a matter of law, or, in the alternative, there is at least a material fact issue, on whether defendants "obtained" the Harmans' interception of the Peavys' conversations, by encouraging them to intercept calls, instructing them on recording techniques, requesting and picking up tapes of recorded conversations from them, and promising to expose Peavy's wrongdoing. Defendants respond that their association

with the Harmans and receipt of the tapes does not constitute "obtaining" the Harmans to make the interceptions.

a.

The Texas Act does not define "obtains"; similarly, the parties did not cite, nor did we find, any Texas cases interpreting that term for purposes of the Act. The parties' briefs focus primarily on federal "procurement". According to the Peavys, "obtain" has essentially the same meaning as "procure". Defendants apparently agree: they maintain the evidence and authorities cited in their discussion of the federal procurement claim also demonstrate they did not "obtain" the Harmans' interceptions in violation of the Texas Act.

The Peavys cite the BLACK'S LAW DICTIONARY definition of "obtain": "to get hold of by effort; to get possession of; to procure; to acquire, in any way." BLACK'S LAW DICTIONARY 1228 (rev. 4th ed., West 1968) (emphasis added). The Seventh Edition of BLACK'S contains no definition of the term. Webster defines it as "to gain or attain possession or disposal of usually by some planned action or method" or "to bring about or call into being". WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 1559 (1986). See also THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1970 (1993) ("Come into the possession or enjoyment of; secure or gain as the result of request or effort; acquire, get.").

The Texas Court of Appeals has stated: "In the absence of a statutory definition, statutory language is measured by common understanding and practices." *Reeves v. State*, 969 S.W.2d 471, 487 (Tex. App. -- Waco 1998), *cert. denied*, 526 U.S. 1068 (1999); *see also Carroll v. State*, 911 S.W.2d 210, 220 (Tex. App. -- Austin 1995) ("in the absence of special definitions, statutory language can be measured by common understanding and practices or construed in the sense generally understood").

Carroll, 911 S.W.2d at 220, relied on dictionary definitions

of "obtain" when construing the Texas statutory exclusionary rule, TEX. CODE CRIM. P. ANN. art. 38.23(a) (prohibiting admission at trial against accused in criminal case of evidence "obtained" in violation of federal or Texas law (emphasis added)). *See Reeves*, 969 S.W.2d at 487 (construing art. 38.23 and stating that "'obtain' means to gain or attain by planned action or effort" (citing *State v. Daugherty*, 931 S.W.2d 268, 270-71 (Tex. Crim. App. 1996))); *Ferguson v. State*, 699 S.W.2d 381, 386 (Tex. App. -- Fort Worth 1985) (citing dictionary definitions in concluding that, although robbery statute uses term "obtain", trial court's use of terms "appropriate" and "acquire", rather than "obtain", in jury charge was not error).

The Peavys contend "obtain" does not require any "active participation" in the interception, but only knowing participation in the overall scheme by which the communications were intercepted. They maintain it is enough to knowingly condone another's interceptions and advise him concerning them; or to implicitly encourage the interception by using the information for the interceptor's benefit.

In this regard, they urge applying the definition of aiding and abetting applied by the Supreme Court in *Nye & Nissen v. United States*, 336 U.S. 613 (1949), cited in the legislative history of the Federal Wiretap Act. *See* S. Rep. No. 90-1097, 90th Cong., 2d Sess., reprinted in 1968 U.S.C.C.A.N. 2112, 2181. In *Nye*, "aid and abet" was defined to mean "that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." *Id.* at 619 (internal quotation marks and citation omitted).

Defendants respond that the Federal Act's legislative history does not discuss or cite any particular language in *Nye* with approval, and does not equate "procure" with "aid and abet". They urge that "procure" (and, presumably, "obtain" for Texas Act purposes) means "actively bringing about, causing or instigating something to be done." Alternatively, they claim that, under the definition relied on by the Peavys, their conduct does

not constitute "aiding and abetting" the interceptions.

Defendants assert there is no evidence they caused, instigated, or enlisted Harman to make the interceptions, or participated in, or encouraged, them. They note his interceptions started before Riggs contacted them, and continued after they stopped accepting tapes from him.

The summary judgment record contains the following evidence pertinent to this "obtains", as well as the "procures", claim. The Harmans acquired the scanner and, prior to contacting WFAA or meeting with Riggs, began intercepting and recording the Peavys' telephone conversations. Defendants never provided Harman with equipment to assist in that.

The Harmans called WFAA and met with Riggs, because they were frustrated with the lack of action by law enforcement authorities to whom they had reported Peavy's conduct, and wanted it investigated and exposed.

When the Harmans asked Riggs whether he wanted a copy of the tape listened to at their initial meeting, and any future tapes they might make, he replied that he did. Riggs instructed Harman not to turn the recorder on and off while listening to the intercepted conversations, and not to edit the tapes, to prevent authenticity challenges.

As the Harmans made additional tapes, they called Riggs and told him. Occasionally, he telephoned the Harmans to ask if additional tapes were available. Riggs testified in his deposition: he was very interested in obtaining any additional information to further his investigation of Peavy; and he asked Harman to keep him aware of whatever else he was hearing.

Either Riggs or Ward picked up the tapes from the Harmans. Harman testified in his deposition: when Riggs came to pick up tapes, he would listen to them at the Harmans' home; he told Harman he would "look into" the contents of the tapes; and later told Harman he was "finding more stuff" based on such contents.

According to Mrs. Harman, Riggs and Harman, after their initial meeting, had "a lot" of telephone conversations. After the Harmans learned recording the conversations was illegal and

WFAA informed them it would not accept additional tapes, they continued intercepting the Peavys' conversations, and continued telephone contact with Riggs. Riggs also met with the Harmans in their home after they learned of the illegality.

On 1 March 1995, after Watler told Riggs, Miller, and Ward they could not accept additional tapes, Riggs called Harman and recorded their conversation, without Harman's knowledge. In that conversation, Riggs discussed the progress defendants had made on the story and assured Harman repeatedly that he and WFAA were going to continue working on the story.

Viewing this evidence in the light most favorable to the Peavys, we conclude that, although they are not entitled to summary judgment on this point, neither are defendants. Construing "obtains" in the sense generally understood (gain or attain by planned action or effort), a reasonable jury could find that, with the exception of the interceptions made by the Harmans prior to their contacting WFAA and Riggs, and possibly the interceptions made after Riggs informed Harman that WFAA would not accept additional tapes, defendants' interim conduct constituted "obtaining" the Harmans to intercept the Peavys' conversations, in violation of the Texas Act (as well as "procuring" them in violation of the Federal Act).

At the very least, to the extent Riggs' instructions regarding recording entire conversations caused the Harmans to intercept and record portions of conversations they otherwise would not have intercepted and recorded, a reasonable jury could conclude Riggs "obtained" (or "procured") the Harmans' interception of those discrete portions.

A reasonable jury also could conclude that defendants' willingness to pursue the investigation and exposure of Peavy's alleged wrongdoing -- the purpose for which the Harmans contacted WFAA -- encouraged the Harmans to continue intercepting, and recording, the Peavys' conversations, even if it was not the sole motivation for their doing so.

b.

Another of defendants' assertions about federal "procurement" appears to bear on the Peavys' Texas "obtains" claim. In a footnote to their contention there is no "procurement" action, defendants conclusorily assert: "if procurement is construed as broadly as [the Peavys] would have it, the ... provision also would be unconstitutional as applied ... and on its face". They cross-reference their contentions that the First Amendment shields them from liability for proscribed "use" and "disclosure."

Obviously, assuming defendants intend this to apply to the "obtains" claim, it is not adequately briefed. In any event, it is without merit. Defendants have essentially conceded the First Amendment would not bar an action against them for interception. There is no basis for distinguishing, for First Amendment purposes, between a person intercepting, on the one hand, and obtaining it through someone else, on the other.

B.

For their state law civil conspiracy claim, and relying on the same evidence supporting their "obtains" claim, the Peavys contend they are entitled to summary judgment, or, in the alternative, there is at least a material fact issue whether defendants conspired with the Harmans to intercept the conversations. Summary judgment was granted defendants on the ground there was no evidence of conspiracy -- that defendants believed in good faith their activities were lawful. *Peavy*, 37 F. Supp. 2d at 524-25.

1.

The Peavys contend ignorance or mistake of law is not a defense to civil conspiracy, so it is irrelevant whether defendants knew their actions violated the Texas Act. Defendants counter

that, because civil conspiracy requires proof of specific intent, the Peavys must prove: (1) Riggs knew his conduct was unlawful (they claim undisputed evidence establishes the contrary); and (2) Riggs entered into an agreement specifically intending to injure the Peavys (they claim there is no evidence of such an agreement).

Civil conspiracy under Texas law is "a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 856 (Tex. 1968) (internal quotation marks and citations omitted). "The essential elements are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983). Not at issue are the first, fourth, and fifth elements.

In Texas, "civil conspiracy requires specific intent." *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995). Proof that a defendant "intended to engage in the conduct that resulted in the injury" is insufficient. *Id.* Instead, "for a civil conspiracy to arise, the parties must be aware of the harm or wrongful conduct at the inception of the combination or agreement." *Id.* "One without knowledge of the object and purpose of a conspiracy cannot be a co-conspirator; he cannot agree, either expressly or tacitly, to the commission of a wrong which he knows not of." *Schlumberger*, 435 S.W.2d at 856. "And, of course, one without knowledge of a conspiratorial plan or scheme to injure another by the commission of a particular wrong cannot share the intent to injure such other." *Id.* at 857.

Based on the evidence discussed supra, a reasonable jury could find that defendants and the Harmans agreed to accomplish a lawful purpose (investigation and exposure of Peavy's alleged wrongdoing), but undertook to do so, at least in part, by unlawful means (proscribed interception, use, and disclosure of Peavys' conversations). It is undisputed that, from the inception of their

association, Riggs knew the Harmans had intercepted and recorded the Peavys' conversations without the knowledge of any of the parties to them.

Thus, defendants were aware of the Harmans' wrongful conduct. None of the cases cited by defendants supports their contention that Texas law requires additional proof they knew about the provisions that made such conduct illegal. Moreover, *Glenn H. McCarthy, Inc. v. Knox*, 186 S.W.2d 832, 838 (Tex. App. -- Galveston 1945), rejects such a contention:

> Though defendants did not know of the illegality of the agreement, the purpose of the conspiracy is to be determined ordinarily by the quality of the acts to be performed under it.... It is therefore not a necessary element that a party have knowledge of the illegality of the end which would be accomplished thereby.

Id. at 838.

Once again, while the Peavys are not entitled to summary judgment on this claim, neither are defendants. A reasonable jury could find the requisite "meeting of the minds" based on the following evidence: Riggs, knowing the circumstances under which the calls were intercepted, agreed to accept, from the Harmans, tapes of the interceptions and conduct an investigation of the contents in an effort to expose Peavy's alleged wrongdoing, which Harman admitted was the purpose for his contacting WFAA and meeting with Riggs; and Riggs instructed Harman to record entire conversations, and to not edit tapes.

2.

Alternatively, defendants contend conspiracy liability would violate their First Amendment protections. This contention is inadequately briefed. In any event, we reject it for the same reasons we rejected their contention that the First Amendment precludes holding them liable, under the Texas Act, for

"obtaining" the interceptions.

C.

Defendants' cross-appeal challenges the holding they violated the "use" and "disclosure" provisions of the Federal and Texas Acts. They maintain they are entitled to summary judgment on this issue, or, in the alternative, that there is a material fact issue, precluding judgment as a matter of law on this point for the Peavys.

This issue is addressed prior to considering the presented First Amendment issues because, obviously, we need not reach them if defendants did not violate these provisions. *See, e.g., County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 154 (1979) (court has "strong duty to avoid constitutional issues that need not be resolved in order to determine the rights of the parties to the case under consideration").

The Federal Act permits a civil action against "any person" who "intentionally" discloses to another person or uses "the contents of any [covered] communication, knowing or having reason to know that the information was obtained through the interception of [a covered] communication in violation of this subsection." 18 U.S.C. § 2511(1)(c) and (d). The Act defines "contents" as including "any information concerning the substance, purport, or meaning of that ... communication." 18 U.S.C. § 2510(8). Similarly, the Texas Act provides: "A party to a communication may sue a person who ... uses or divulges information that he knows or reasonably should know was obtained by interception of the communication." TEX. CIV. PRAC. & REM. CODE § 123.002(a)(2) (emphasis added). For our purposes, "disclose" under the Federal Act and "divulge" under the Texas Act are considered equivalent.

The district court held defendants violated the Acts by "using" the contents of the illegally intercepted conversations to analyze, compile, make notes, and develop leads; and by "disclosing" those contents in their television broadcasts and to

other persons. *Peavy*, 37 F. Supp. 2d at 514-15. On a multitude of grounds, defendants challenge these "used-and-disclosed" conclusions.

1.

a.

First, defendants contend that, in their television broadcasts, they did not use or disclose the tapes' contents, because the broadcasts were based entirely on sources independent of the tapes, and those sources "attenuated" the taint of the interceptions. Defendants maintain they should not be forever barred from investigating all topics discussed in the intercepted conversations merely because they first learned of those topics as a result of the interceptions.

The "attenuation doctrine" was developed in Fourth Amendment jurisprudence, for criminal cases, as an exception to the exclusionary rule. *See Wong Sun v. United States*, 371 U.S. 471, 485-88 (1963). That rule generally prohibits admission of evidence obtained "during or as a direct result" of a search or seizure in violation of the Fourth Amendment. *Id.* at 485. But, under the attenuation doctrine, such evidence may be admissible if "the connection between the lawless conduct of the police and the discovery of the challenged evidence has become so attenuated as to dissipate the taint." *United States v. Ceccolini*, 435 U.S. 268, 274 (1978) (internal quotation marks and citation omitted).

In correctly rejecting defendants' reliance on this doctrine, the district court stated: "The fact that Riggs later obtained the same information from independent sources" was irrelevant, *Peavy*, 37 F. Supp. 2d at 514, because "the exclusionary rule does not excuse a substantive violation of the law." *Id.* at 514 n.17.

Defendants' reliance on cases addressing the suppression of wiretap evidence under the Federal Act exclusionary rule, § 2515 (if communication intercepted, contents and evidence derived therefrom may not be received in evidence if such disclosure

would violate Act), is misplaced in the context of whether defendants are liable for "use" and "disclosure." *E.g., United States v. Smith*, 155 F.3d 1051, 1059-63 (9th Cir. 1998) (applying attenuation doctrine in resolving § 2515 suppression issue), *cert. denied*, 525 U.S. 1071 (1999); *United States v. Baranek*, 903 F.2d 1068, 1072 (6th Cir. 1990) (applying Fourth Amendment principles to resolve § 2515 suppression issues).

b.

We reject Defendants' claim that their television broadcasts did not constitute "disclosure" because much of the information in them was provided a week earlier in a television broadcast by another station. Defendants' broadcasts included substantial information not broadcast by the other station. For example, the other broadcast did not refer to Peavy's plan to sell insurance to an entity other than DISD. Moreover, this contention is inconsistent with defendants' television broadcasts, which frequently touted the exclusivity of their reporting and investigation.

c.

Nevertheless, we conclude there is a material fact issue whether, in their television broadcasts, defendants intentionally disclosed the contents of the illegal interceptions. As discussed infra, this is independent of "use" liability.

Defendants did not play interception-tapes in their television broadcasts. Although the record contains considerable evidence that their entire investigation of Peavy and DISD insurance would not have occurred but for those tapes, and that some of the topics covered in their broadcasts were initially derived from them, that evidence is not uncontradicted. There is also considerable evidence of their extensive investigation, and their reliance on sources independent of the intercepted contents for the material reported in those broadcasts.

Therefore, a reasonable jury could conclude that, in their television broadcasts, defendants did not intentionally disclose the intercepted contents, but instead disclosed information obtained from sources independent of them.

Again, this point concerns only whether, in their television broadcasts, defendants intentionally disclosed intercepted contents, not whether they used the contents in their investigation or otherwise made other types of disclosures of those contents. As discussed infra, the Wiretap Acts restrict the publication of information based solely on the means by which it was acquired. Accordingly, the Acts do not prohibit disclosure of information that might be contained in illegal interceptions, so long as such disclosed information is acquired by other, non-prohibited means. Therefore, if a jury finds defendants' television broadcasts reported information obtained from sources independent of the tapes, defendants would not be liable, under the Wiretap Acts, for disclosing such information in their television broadcasts, even if the information so disclosed was also included in the contents of those intercepted communications.

This distinction between "use" and "disclosure" gives effect to both provisions, and does not undermine their purposes. Prohibiting liability for disclosure, where it is based on sources independent of interceptions, does not create a market for the contents of interceptions. This is because, as noted, the person making such disclosure still remains subject to punishment under the Acts' "use" provisions, if, for example, the intercepted communications are used to obtain such independent sources.

Accordingly, the district court erred in holding as a matter of law that, in their television broadcasts, defendants intentionally disclosed the contents of the Peavys' conversations.

2.

Regarding defendants' "use", as well as their "disclosure" by means other than through a television broadcast, defendants

claim, on five bases, exceptions, as a matter of law, to liability: (a) newsgathering; (b) internal disclosure to corporate agents; (c) common-interest privilege; (d) disclosure to attorney for legal advice; and (e) disclosure to law enforcement officials.

a.

Defendants maintain "use" and "disclosure", during their investigation and newsgathering, is not proscribed. They do not deny that they used and, in a non-broadcast context, disclosed the contents of the interceptions. Instead, they assert the court's broad interpretations of "use" and "disclosure" seriously jeopardize vital First Amendment interests; and, to preserve them, we should construe the terms narrowly and conclude that exploring leads from lawfully obtained information is not proscribed "use" or "disclosure."

The only case cited in support is *United States v. Smith*: "A lead ... is simply not enough to taint an entire investigation." 155 F.3d at 1063. As discussed supra, Smith is a criminal case in which Fourth Amendment principles were applied in discussing suppression under § 2515, the statutory exclusionary rule. It offers no support for defendants' narrow construction of "use" and "disclosure." Defendants' First Amendment contentions are addressed infra.

b.

Defendants contend disclosures to WFAA employees of the contents of the interceptions are not actionable because a corporation cannot disclose information to itself. They maintain this principle also applies to disclosures to their attorney, Watler, and to the person who transcribed portions of the interceptions, because both acted as WFAA's agents.

Defendants cite no authority for holding intra-organization disclosures are not violative of the Wiretap Acts. The Acts authorize certain specified disclosures. Such exceptions do not

include the types made by defendants. *See* 18 U.S.C. § 2517(1) (authorizing disclosure by "any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any [covered] communication or evidence derived therefrom" to "another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure"); 18 U.S.C. § 2517(3) (authorizing disclosure by "any person who has received, by any means authorized by this chapter, any information concerning a [covered] communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter ... while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof"); TEX. CIV. PRAC. & REM. CODE § 123.003(a) (authorizing disclosure by "switchboard operator or an officer, employee, or agent of a communication common carrier whose facilities are used in the transmission of a wire communication ... in the normal course of employment if engaged in an activity that is necessary to service or for the protection of the carrier's rights or property").

Accordingly, such use and disclosure, during defendants' investigation and newsgathering, are proscribed by the Federal and Texas Acts.

c.

Defendants also maintain disclosures to WFAA employees and agents are protected by a "common interest" privilege. That privilege, applicable in defamation cases, "attaches to statements which occur under circumstances wherein any one of several persons having a common interest in a particular subject matter may reasonably believe that facts exist which another, sharing that common interest, is entitled to know." *Gaines v. CUNA Mut. Ins. Soc'y*, 681 F.2d 982, 986 (5th Cir. 1982) (citing case

applying Texas law).

Defendants acknowledge, however, that this privilege has not been applied in cases involving the Wiretap Acts. This issue, raised in a footnote, is not adequately briefed. In any event, for purposes of this case, the privilege is not available. Neither Act authorizes disclosure in such circumstances. *See* 18 U.S.C. § 2517(1) and (3); TEX. CIV. PRAC. & REM. CODE § 123.003(a).

d.

Defendants contend that disclosure to their attorney, Watler, is not actionable, because they consulted him for legal advice. They rely on *Nix v. O'Malley*, 160 F.3d 343 (6th Cir. 1998), which recognized an implied "defense exception" to disclosure liability, pursuant to which the defendant had a privilege to disclose contents of an interception to his attorneys "to assist in the defense of the claims made against him." *Id.* at 351 (internal quotation marks omitted). The Sixth Circuit cited with approval *McQuade v. Michael Gassner Mechanical & Elec. Contractors, Inc.*, 587 F. Supp. 1183 (D. Conn. 1984), in which that court stated:

> To deny defendants' counsel any possibility of investigating or rebutting the allegations on which [a] claim for punitive damages is based, or of discussing the contents of the tapes with their clients in the course of preparing a defense of [a] lawsuit, would be to convert the allegations of the complaint into a judgment.

587 F. Supp. at 1190.

Defendants' reliance on these cases is misplaced; their "disclosures" to Watler were not made for the purpose of defending against Wiretap Act claims. Instead, they were made after he advised them (erroneously) that the Federal Act did not apply to cordless telephone communications.

There was no need for defendants to make the "disclosures" to Watler in order to obtain his legal advice on whether the Wiretap Acts proscribed such interception. And, there is no evidence that, at that time, defendants or Watler contemplated the possibility of civil actions against defendants under the Federal or Texas Acts. In fact, the record does not indicate Watler was even aware of the existence of the Texas Act; it does not reflect that he ever advised defendants about it.

e.

(1)

Defendants claim Riggs' "disclosures" to federal law enforcement authorities and the Dallas Police Department do not provide a basis for liability because those agents were already aware of the contents of the communications at the time Riggs discussed his investigation with them. The record does not support this contention.

In his deposition, Riggs admitted that ATF Agent Curtiss did not already know about the tapes before Riggs described their contents to him. And, he testified that, prior to their conversation, Dallas Police Detective Storey, to whom he also disclosed the contents of the communications, did not seem to know about them.

(2)

Alternatively, defendants contend Riggs' "disclosures" to law enforcement officials were protected by a qualified privilege to report crimes. As stated supra, the Federal and Texas Acts authorize "disclosure" only in specified, limited circumstances, none of which include the "disclosures" made by Riggs.

In *Rodgers v. Wood*, 910 F.2d 444 (7th Cir. 1990), the court rejected a similar privilege claim, holding that the Federal Act provides "no support for recognizing [an] exception for the common law privileges protecting statements made to law

enforcement agents in furtherance of criminal investigations." *Id.* at 447.

> The very nature of the Act is to impose limitations on the effectiveness of law enforcement agents in the interests of protecting the privacy of citizens....The Act represents Congress's careful balancing between the interests of the enforcement of criminal laws and the assurance of privacy in oral and wire communications. To recognize a common law privilege as [defendant] suggests would upset that balance.

Id.

3.

The Federal Act prohibits "intentionally" using or disclosing the contents of covered communications, "knowing or having reason to know that the information was obtained through the interception" of such a communication in violation of the Act. 18 U.S.C. § 2511(1)(c) and (d) (emphasis added). Under the Texas Act, "a person who ... uses or divulges information that he knows or reasonably should know was obtained by interception of the communication" may be civilly liable. TEX. CIV. PRAC. & REM. CODE § 123.002(2) (emphasis added).

Defendants assert that, in their "uses" and "disclosures", they did not act "intentionally", as required for liability, because, in good faith reliance on the advice of law enforcement officials and legal counsel, they did not know, or have reason to know, the conversations were intercepted illegally. They insist they are not claiming "mistake of law", in which a defendant asserts that his subjective, good faith belief in the lawfulness of his conduct excuses a violation of the law. Instead, they contend their state of mind as to the legality of their conduct bears directly on whether they acted "intentionally."

The district court rejected that contention, relying on our

court's having "implicitly rejected a good faith defense," *Peavy*, 37 F. Supp. 2d at 511, in *Forsyth*, 19 F.3d at 1538 n.21 (knowledge element for use and disclosure liability requires proof defendant knew "1) the information used or disclosed came from an intercepted communication, and 2) sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited in light of [the Act]" (quoting *Thompson v. Dulaney*, 970 F.2d 744, 749 (10th Cir. 1992))). *Peavy*, 37 F. Supp. 2d at 511.

Defendants rely on *United States v. Schilleci*, 545 F.2d 519 (5th Cir. 1977), to support their contention that the Federal Act requires proof of specific intent: that defendants acted intentionally with the knowledge their conduct violated the Act. But, as the district court noted, the criminal defendant in *Schilleci* was charged with conspiracy to intercept wire and oral communications; and conspiracy is a specific intent crime. *Peavy*, 37 F. Supp. 2d at 511 n.14.

It is undisputed defendants knew that the information they used and disclosed came from interceptions. It is also undisputed they were aware of sufficient facts concerning the circumstances of those interceptions such that they could, with presumed knowledge of the law, determine the interceptions were prohibited by law. Defendants contend, however, that the presumption they acted with knowledge of the law was overcome by proof of erroneous legal advice and reasonable reliance on the Harmans' statements that law enforcement officials had told them the interception and recording were legal. They maintain such reliance negates the mental state required for liability.

Despite their insistence to the contrary, acceptance of defendants' contentions would constitute recognition of an ignorance or mistake of law defense to Federal and Texas Wiretap Act liability. As the district court noted, our court, at least implicitly, rejected such a defense in *Forsyth*; and it has been rejected by numerous other courts. *E.g., Reynolds v. Spears*, 93 F.3d 428, 435-36 (8th Cir. 1996) (defendant's reliance

on incorrect advice from law enforcement officer not defense to liability under Federal Act); *Williams v. Poulos*, 11 F.3d 271, 285 (1st Cir. 1993) (rejecting good faith defense where defendant mistakenly believed use and disclosure authorized by statute); *Thompson v. Dulaney*, 970 F.2d 744, 749 (10th Cir. 1992) ("defendant may be presumed to know the law"); *Heggy v. Heggy*, 944 F.2d 1537, 1541 (10th Cir. 1991) (rejecting "good faith" defense to Federal Act liability based upon mistake of law), *cert. denied*, 503 U.S. 951 (1992); *United States v. McIntyre*, 582 F.2d 1221, 1224-25 (9th Cir. 1978) (rejecting contention interception not "willful" because defendants believed in good faith, based on advice from a law enforcement communications technician, that their conduct was legitimate).

We join those courts and reject an ignorance or mistake of law defense for disclosure or other use of communications illegally intercepted in violation of § 2511(1)(c) and (d) of the Federal Act and § 123.002(2) of the Texas Act. Based on the existence of the Acts and their knowledge of the circumstances of the Harmans' interception, defendants, at a minimum, had reason to know the interceptions were illegal. They used and disclosed the contents of those interceptions purposefully, not inadvertently.

4.

Remaining are three "use" and "disclosure" issues: two raised by defendants; one, by the Peavys. We do not consider any of them, because they were not raised in the parties' opening briefs. *E.g., United States v. Jackson*, 50 F.3d 1335, 1340 n.7 (5th Cir. 1995) ("It is well-settled that, generally, we will not consider issues raised for the first time in a reply brief.").

Defendants contend, for the first time in their reply brief, that "use" and "disclosure" damages are not permissible without proof of actual malice under the standard from *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964); and that, because the majority of the Peavys' "use" and "disclosure" allegations

were untimely, we should reverse the district court's "use" and "disclosure" holding. (Moreover, the untimeliness issue is not adequately briefed. And, assuming it has any validity, it would seem to be a matter for the district court's consideration for trial.)

Likewise, in their brief as cross-appellees, rather than in their opening brief, the Peavys challenge the district court's holding that listening to tapes, and reading transcripts, of interceptions was not a prohibited "use". (Moreover, as cross-appellees on this issue, they cannot seek to enlarge their rights under the district court's decision. *See Laker v. Vallette (Matter of Toyota of Jefferson, Inc.)*, 14 F.3d 1088, 1090 n.1 (5th Cir. 1994).)

D.

Despite holding that defendants "used" and "disclosed" the interceptions in violation of the Wiretap Acts, based, in part, on concluding, as required by the Acts, that defendants knew, or had reason to know, the interceptions were in violation of the Acts, the district court nevertheless granted summary judgment for defendants on the use and disclosure claims, on the ground that imposition of liability would violate the First Amendment. *Peavy*, 37 F. Supp. 2d at 515-18. In so doing, it applied the strict scrutiny analysis from *The Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989). *Peavy*, 37 F. Supp. 2d at 515-16.

One of the key bases underlying this First Amendment holding was the court's conclusion that, although the Harmans intercepted illegally, defendants nevertheless "lawfully obtained" the contents of those interceptions because they neither participated in them nor procured/obtained the Harmans to do so. *Id.* at 516-17. Therefore, in addressing the as-applied constitutionality of the "use" and "disclosure" provisions, the district court did not consider defendants' participation concerning the interceptions, such as Riggs advising the Harmans to record complete conversations. But, such participation, even if not rising to the level of "procuring" or "obtaining" the Harmans to make the interceptions, is a factor

that must be considered in our de novo review of the summary judgment awarded defendants on their claim that, on the facts in this case, the "use" and "disclosure" provisions are unconstitutional.

Regarding such participation, there is a material fact issue for the Texas "obtains" claim. And, even though the Peavys cannot bring an action/obtain damages if defendants, in violation of the Federal Act, "procured" the Harmans to make the interceptions, such "procurement" vel non (for which there is also a material fact issue) has a bearing on whether the contents of the interceptions were lawfully received by defendants. If not lawfully received, this obviously changes the scope of the issue to be addressed for this as-applied challenge.

Because of the material fact issue on "procure/obtain" and the linkage of such conduct to whether defendants "lawfully received" the tapes, the as-applied constitutional issue arguably could be avoided now, by remanding it for reconsideration by the district court at trial. Three considerations cut against doing so.

First, as discussed infra, defendants', especially Riggs', participation concerning the interceptions, together with the other factors considered infra, compels our upholding the constitutionality of the "use" and "disclosure" provisions of the Federal and Texas Acts. In short, further evidence is not needed for this issue.

Second, if we remanded this constitutional issue for trial (further evidence), in an attempt to avoid reaching it, our reaching it would probably simply be delayed, instead, and at great cost in time and expense to the parties and district court. Because of the summary judgment posture of this case, such avoidance of the constitutional issue at this stage would not be prudential. "The flame is not worth the candle."

Third, and related to the second consideration, even if the Peavys prevail at trial on their Texas "obtains" claim, that would not obviate the necessity of the constitutionality of the "use" and "disclosure" provisions being addressed, because, notwithstanding whether defendants may be liable for damages

for "obtaining" another to make the interceptions, in violation of the Texas Act, both Acts also authorize separate damages for each "use" or "disclosure" violation. *See Fultz v. Gilliam*, 942 F.2d 396, 402 (6th Cir. 1991) ("The text of the [Federal Act] plainly indicates, and its purpose necessitates, that a new and discrete cause of action accrue ... each time a recording of an unlawfully intercepted communication is played to a third party who has not yet heard it."); *Bess v. Bess*, 929 F.2d 1332, 1334 (8th Cir. 1991) (plaintiff awarded damages for each of 12 days of interception, as well as additional statutory damages for use of contents).

In this respect, in permitted civil actions for violation of the Federal Act, "the court may assess as damages whichever is the greater of ... the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or ... statutory damages of whichever is the greater of $ 100 a day for each day of violation or $ 10,000." 18 U.S.C. § 2520(c)(2). Punitive damages, reasonable attorney's fees, and costs are also authorized. 18 U.S.C. § 2520(b). Likewise, under the Texas Act, a person may recover, inter alia, $ 1,000 statutory damages, actual damages in excess of $ 1,000, punitive damages, and reasonable attorney's fees and costs. TEX. CIV. PRAC. & REM. CODE § 123.004.

Accordingly, the more narrow issue before us is whether, on the facts in this case, the First Amendment is violated by the Federal and Texas Acts, as applied to the use and disclosure of illegally intercepted communications about matters of public significance, by persons who: knew, or had reason to know, the communications were intercepted in violation of the Acts; but who did not themselves make the interceptions; but who did have undisputed participation concerning the interceptions to the extent defendants did.

1.

a.

Defendants urge the district court was correct in applying strict scrutiny and concluding that, absent a government interest of the highest order, the First Amendment prohibits punishing the media for using and disclosing "lawfully-received", truthful information about matters of public significance. Therefore, defendants claim the "use" and "disclosure" provisions are unconstitutional as applied to them. (Their alternative, facial challenge to the constitutionality of those provisions, based on vagueness and overbreadth, is discussed infra.)

Of course, because defendants violated the use/disclosure provisions as a matter of law, as well as it being undisputed that defendants, especially Riggs, did participate to some extent concerning the interceptions, and as well as there being a material fact issue whether defendants "procured" or "obtained" the Harmans to make the interceptions, it is quite questionable, as discussed infra, that defendants "lawfully received" the intercepted contents. In any event, they rely primarily on the Supreme Court's decisions in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); and *Florida Star*.

Landmark concerned a newspaper indicted for violating a Virginia statute which proscribed divulging information about proceedings before a state judicial review commission authorized to hear complaints about judges' disability or misconduct. 435 U.S. at 830. The newspaper accurately reported on an inquiry pending before the commission. *Id.* 435 U.S. 829 at 831.

The "narrow and limited question presented" was "whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the [commission]." *Id.* at 837. The Court held: "The publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and

[Virginia's] interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom." *Id.* at 838.

The Court, however, was not "concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it." *Id.* at 837 (emphasis added). (Again, there are material fact issues whether defendants "procured" or "obtained" the Harmans to make the illegal interceptions.)

At issue in *Daily Mail* was a West Virginia statute which singled out newspapers for criminal sanctions if a juvenile offender's name was published without written approval of the juvenile court. 443 U.S. at 98. Through routine monitoring of a police radio frequency, two newspapers learned about the shooting death of a student, and immediately sent reporters and photographers to the school where the incident occurred. *Id.* at 99. Reporters there obtained the name of the alleged assailant, a minor, from witnesses, the police, and a prosecutor. *Id.*

Both newspapers were indicted under the statute for publishing articles about the incident. *Id.* at 99-100. One did not mention the alleged shooter's name in its first article, published the afternoon of the shooting, because of the statute's prohibition; but, both named him in articles published the next day, after at least three different radio stations had broadcast his name. *Id.* at 99-100.

The Court concluded that the statute did not satisfy the constitutional standards applied in *Landmark*. *Id.* at 102. "[Our] recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards," *id.*; and those opinions "suggest strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Id.* at 103

(emphasis added).[1]

The Court stated that, "even assuming the statute served a state interest of the highest order [protecting anonymity of juvenile offenders], it does not accomplish its stated purpose", because it applied only to newspapers, and thus did not prevent publication by other media. *Id.* at 105. The Court pointed out, however: its holding was "narrow"; and no issue of privacy was involved. *Id.*

Florida Star concerned a Florida statute which made it unlawful to "print, publish, or broadcast ... [a sex offense victim's name] in any instrument of mass communication." 491 U.S. at 526 (internal quotation marks and citation omitted). A newspaper published a rape victim's name after obtaining it from a publicly released police report. The newspaper was held liable in an action by the victim based on violation of the statute. *Id.* at 526.

Although the Court ultimately concluded that such imposition of damages violated the First Amendment, it refused the newspaper's invitation to hold broadly "that the press may never be punished, civilly or criminally, for publishing the truth." *Id.* at 531. Instead, "the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more

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[1] In addition to citing *Landmark*, the Court cited *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (where rape victim's name became known to public through official court records dealing with rapist's trial, damages could not be recovered against newspaper for publishing victim's name in violation of state statute that criminalized such publication); and *Oklahoma Publ'g Co. v. District Court*, 430 U.S. 308 (1977) (vacating injunction prohibiting news media from publishing name or photograph of juvenile, where, despite state statute closing juvenile trials to public, judge had permitted reporters and other members of public to attend court hearing, because state cannot constitutionally restrain dissemination of truthful information in public domain). *Daily Mail*, 443 U.S. at 102-03. Although those "cases involved situations where the government itself provided or made possible press access to the information," *id.* at 103, the Court said that factor was "not controlling," *id.*, because "[a] free press cannot be made to rely solely upon the sufferance of government to supply it with information." *Id.* at 104.

broadly than the appropriate context of the instant case." *Id.* at 533.

The principle from *Daily Mail* was applied: "If a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Id.* (emphasis added; internal quotation marks and citation omitted). In addition to "the overarching public interest, secured by the Constitution, in the dissemination of truth", three additional considerations supported "according the press the ample protection provided by that principle." *Id.* at 534 (internal quotation marks and citation omitted).

First, "because the *Daily Mail* formulation only protects the publication of information which a newspaper has lawfully obtained, the government retains ample means of safeguarding significant interests upon which publication may impinge." *Id.* at 534 (emphasis added; internal quotation marks and citation omitted). Especially significant for the purposes of the case at hand, the Court noted: "To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired." *Id.* (emphasis added).

Second, "punishing the press for its dissemination of information ... already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act." *Id.* at 535 (emphasis added).

The third, and final, consideration supporting application of the *Daily Mail* principle was the "timidity and self-censorship which may result from allowing the media to be punished for publishing certain truthful information." *Id.* (internal quotation marks and citation omitted). Such "fear of excessive media self-suppression" was applicable to "information released, without qualification, by the government." *Id.* at 535-36.

Applying *Daily Mail*, the Court held the newspaper could not

be held civilly liable, because: (1) it had "lawfully obtained truthful information about a matter of public significance," *id.* (emphasis added; internal quotation marks and citation omitted); and (2) although the state's interests in protecting rape victims' privacy and physical safety and encouraging them to report sex offenses without fear of exposure are "highly significant interests", imposing liability for publication under the circumstances of that case was "too precipitous a means of advancing" those interests, *id.* at 537, because (a) the government provided the information to the media, which "made it especially likely that, if liability were to be imposed, self-censorship would result," *id.* at 538; (b) under the negligence per se standard applied by Florida courts, liability follows automatically from publication, without "a scienter requirement of any kind ..., engendering the perverse result that truthful publications challenged pursuant to this cause of action are less protected by the First Amendment than even the least protected defamatory falsehoods," *id.* at 539; and (c) the statute was facially underinclusive, because it proscribed publication only by an "instrument of mass communication", but not by other means, *id.* at 540.

The Court stressed the "limited" nature of its holding:

> We do *not* hold that truthful publication is automatically constitutionally protected, *or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press*, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information *which it has lawfully obtained*, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability ... *under the facts of this case*.

Id. at 541 (emphasis added).

Footnote eight, extremely relevant to the case at hand, stated: "The *Daily Mail* principle does *not* settle the issue whether, in cases where information has been acquired ***unlawfully by a newspaper or by a source***, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." *Id.* at 535 n.8 ("unlawfully" emphasized in original; other emphasis added).

b.

The Peavys and the United States urge that distinctions between the Federal and Texas Acts and the statutes at issue in *Florida Star*, *Daily Mail*, and *Landmark* make inapplicable the analysis applied in those cases. They rely heavily on the fact that those statutes, unlike the Wiretap Acts, restricted speech on the basis of content; penalized the disclosure of information without imposing any underlying limitation on its acquisition; and, in *Florida Star*, sanctioned the media for publishing information provided by the government.

Pursuant to *United States v. O'Brien*, 391 U.S. 367 (1968), the Peavys and the United States claim the Wiretap Acts are subject only to intermediate First Amendment scrutiny, because they are content-neutral laws of general applicability, which do not single out the media for special burdens, and have only an incidental effect on its ability to gather and report the news. They also rely on *Branzburg v. Hayes*, 408 U.S. 665 (1972); and *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

In *O'Brien*, a person convicted for burning his draft card made a First Amendment challenge to a federal statute which criminalized, inter alia, such knowing destruction. 391 U.S. at 370. The statute was held constitutional, facially and as applied. *Id.* at 372.

The Court noted that, on its face, the statute did not abridge free speech, but instead dealt "with conduct having no connection with speech," and "there is nothing necessarily expressive" involved in O'Brien's conduct. *Id.* at 375. It refused

to "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.* at 376. But, even assuming "the alleged communicative element in O'Brien's conduct [was] sufficient to bring into play the First Amendment, it [did] not necessarily follow that the [card's] destruction ... is constitutionally protected activity." *Id.*

The statute was held to satisfy the level of scrutiny applied when "'speech' and 'nonspeech' elements are combined in the same course of conduct." *Id.* at 376-77.

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

At issue in *Branzburg* was "whether requiring newsmen to appear and testify before ... grand juries abridges the freedom of speech and press guaranteed by the First Amendment." 408 U.S. at 667. The reporters maintained that, in order to gather news, they often had to agree either not to identify the source of published information, or to publish only a portion of the facts revealed by him. *Id.* at 679.

In holding newsmen could be required to so testify, the Court pointed out it was not suggesting "news gathering does not qualify for First Amendment protection [, because] without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. On the other hand, "it is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." *Id.* at 682. Similarly, "it has generally been held that the First Amendment does not

guarantee the press a constitutional right of special access to information not available to the public generally." *Id.* at 684 (emphasis added).

The Court declined to "grant newsmen a testimonial privilege that other citizens do not enjoy", because it "perceived no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation." *Id.* at 690-91.

Of particular interest for the case at hand is this observation:

> *It would be frivolous to assert ... that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although* stealing documents *or private wiretapping could provide newsworthy information*, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news.... *The Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons.*

Id. at 691-92 (emphasis added).

Cohen concerned "whether the First Amendment prohibits a plaintiff from recovering damages, under state promissory estoppel law, for a newspaper's breach of a promise of confidentiality given to the plaintiff in exchange for information." 501 U.S. at 665. Holding that it does not, the Court refused to apply the analysis used in *Landmark*, *Daily Mail*, and *Florida Star*. *Id.* at 668-69.

Instead, controlling was "the equally well-established line of decisions holding that generally applicable laws do *not* offend

the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669 (emphasis added).[2] The *Florida Star* line of cases was distinguished on the ground that "the truthful information sought to be published must have been *lawfully acquired*. The press may not with impunity break and enter an office or dwelling to gather news." *Id.* (emphasis added).

"It is ... beyond dispute that the publisher of a newspaper has no special immunity from the application of general laws [and] has no special privilege to invade the rights and liberties of others." *Id.* 501 U.S. at 670 (internal quotation marks and citation omitted). Therefore, "enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." *Id.*

Minnesota's doctrine of promissory estoppel was "a law of general applicability", because it did "not target or single out the press", but was "generally applicable to the daily transactions of all the citizens of Minnesota." *Id.* Accordingly, "the First Amendment did not forbid its application to the press." *Id.* Applying that estoppel doctrine to the newspapers would not

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[2] For illustrating such generally applicable laws, the enforcement of which have incidental effects on the media's ability to gather and report news, *Cohen* cited the following cases, all but two of which concern commercial regulation: *University of Pa. v. E.E.O.C.*, 493 U.S. 182, 201-02 (1990) (must pay non-discriminatory taxes); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581-83 (1983) (same); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576-79 (1977) (may not publish copyrighted material without obeying copyright laws); *Branzburg*; *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 139 (1969) (may not restrain trade in violation of antitrust laws); *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 192-93 (1946) (must comply with Fair Labor Standards Act); *Associated Press v. United States*, 326 U.S. 1 (1945) (may not restrain trade in violation of antitrust laws); *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943) (must pay non-discriminatory taxes); and *Associated Press v. National Labor Relations Bd.*, 301 U.S. 103 (1937) (must comply with National Labor Relations Act).

punish them for publishing lawfully-obtained, truthful information, because "compensatory damages are not a form of punishment" and, "in any event, ... the characterization of the payment makes no difference for First Amendment purposes when the law being applied is a general law and does not single out the press." *Id.*

Florida Star and *Daily Mail* were distinguished: "In those cases, the State itself defined the content of publications that would trigger liability"; in contrast, in *Cohen*, "the parties themselves ... determined the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed." *Id.* at 670-71.

In addition, it was "not at all clear that [the newspaper] obtained Cohen's name 'lawfully' ..., at least for purposes of publishing it", because it obtained it "only by making a promise ... [it] did not honor." *Id.* at 671 (emphasis added). The dissenting opinions' suggestion "that the press should not be subject to any law ... which in any fashion or to any degree limits or restricts the press' right to report truthful information" was rejected, because "the First Amendment does not grant the press such limitless protection." *Id.*

Cohen concluded that, if permitting a promissory estoppel claim had the effect of "inhibiting truthful reporting because news organizations will have legal incentives not to disclose a confidential source's identity even when that person's identity is itself newsworthy", then it was "no more than the incidental, and constitutionally insignificant, consequence of applying to the press a generally applicable law that requires those who make certain kinds of promises to keep them." *Id.* at 671-72.

c.

Two recent cases from other circuits have addressed the level of scrutiny for the constitutionality vel non of the Federal Act: *Bartnicki v. Vopper*, 200 F.3d 109 (3d Cir. 1999), *cert. granted*, 120 S. Ct. 2716 (U.S. 26 June 2000) (Nos. 99-1687 and

99-1728); *Boehner v. McDermott*, 338 U.S. App. D.C. 109, 191 F.3d 463 (D.C. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3686 (U.S. 25 Apr. 2000) (No. 99-1709). In *Boehner*, a Florida couple, using a radio scanner, intercepted and recorded a telephone conversation between Congressman Boehner, a Republican member of the House of Representatives, and members of his Party. 338 U.S. App. D.C. 109, 191 F.3d 463 at 464-65. The couple delivered the tape to Congressman McDermott, then the ranking Democratic member of the House Ethics Committee, explaining by cover letter the tape contained "a conference call heard over a scanner." *Id.* at 465. Congressman McDermott gave copies of the tape to three newspapers, each of which published an article about the intercepted conversation. *Id.*

Congressman Boehner filed a civil action against Congressman McDermott (but not the newspapers) for violating § 2511(1)(c) (disclosure). *Id.* The district court agreed with Congressman McDermott that § 2511(1)(c), as applied to him, violated the First Amendment. *Id.* at 466. The court of appeals (split panel) reversed, applying intermediate scrutiny. *Id.* 467-70.

The majority opinion observed that "the *O'Brien* analysis applies to statutes containing generally applicable, content-neutral prohibitions on conduct that create incidental burdens on speech." *Id.* at 467. Section 2511(1)(c) fit that description because, to the extent it proscribes disclosures which "entail constitutionally protected speech, the statute regulates it without reference to content," *id.* at 468; and it furthers a substantial governmental interest unrelated to the suppression of free expression because, "rather than impinging on speech, ... [it] promotes the freedom of speech." *Id.*

The incidental restriction on speech imposed by § 2511(1)(c) was "no greater than is essential to the furtherance" of the government's substantial interests: "Without [that] prohibition ..., the government would have no means to prevent the disclosure of private information, because criminals like [the intercepting Florida couple] can literally launder illegally intercepted

information and there would be almost no force to deter exposure of any intercepted secret." *Id.* at 470 (internal quotation marks and citation omitted).

The majority, for separate reasons, distinguished *Florida Star*. One member concluded it had no application for a host of reasons, including: § 2511(1)(c) is not directed at the press; it seeks to protect the privacy of private, not public, communications; and it has a scienter requirement. *Id.* at 471-76. The other majority-member assumed, without deciding, that Florida Star "applies in principle" but, because Congressman McDermott did not lawfully obtain the tape, § 2511(1)(c) was subject to intermediate scrutiny as applied to him. *Id.* at 479.

For *Bartnicki,* as noted, the Court granted certiorari in June 2000. The case concerned an unknown person intercepting and recording a cellular telephone conversation, regarding a teachers' pay raise, between Kane, a teachers' union president, and Bartnicki, a union negotiator. 200 F.3d at 113. The anonymous interceptor left the tape in the mailbox of Yocum, the president of a citizens' organization opposed to the union's proposals. *Id.* After listening to the tape, Yocum gave copies to local radio stations, which broadcast parts of it. *Id.*

Bartnicki and Kane sued Yocum and the media defendants for violating § 2511(1)(c) and (d) (disclosure and use), and similar provisions of a Pennsylvania statute. *Id.* Relying primarily on Cohen, the district court denied summary judgment for defendants, holding that the use and disclosure provisions were generally applicable laws that did not single out the media or purposefully restrict free expression, and could be applied to the media without offending the First Amendment. *Id.* at 118.

On interlocutory appeal, the Third Circuit panel majority rejected the media defendants' contention that *Daily Mail* controlled, because *Florida Star* footnote eight, quoted supra and infra, "explicitly repudiated any suggestion that *[Daily Mail]* answers ... whether a statute that limits the dissemination of information obtained by means of questionable legality is subject to First Amendment scrutiny." *Id.* at 117 (emphasis added). The

court did not resolve whether the damages provisions of the Federal and Pennsylvania Acts were generally applicable laws, because the district court, "by suggesting that generally applicable laws do not require First Amendment scrutiny when applied to the press, ... read ... *Cohen* too broadly." *Id.* at 118. Instead, the court interpreted *Cohen* to hold "that a law of general applicability, which neither targets nor imposes disproportionate burdens upon the press, is enforceable against the press to the same extent that it is enforceable against individuals or organizations." *Id.* at 119.

As in the case at hand, the United States intervened in *Bartnicki* to defend the constitutionality of the Federal Wiretap Act. It claimed the use and disclosure provisions are subject to intermediate scrutiny for two reasons: (1) they are generally applicable laws imposing only incidental burdens on expression; and (2) to the extent the provisions restrict speech in particular cases, they do so in a content-neutral manner. *Id.*

The court rejected the first contention: "When a statute that regulates both speech and conduct is applied to an act of pure speech, that statute must meet the same degree of First Amendment scrutiny as a statute that regulates speech alone." *Id.* at 121.

But, it agreed that the use and disclosure provisions are content-neutral, because the justification for proscribing such conduct – strengthening "the underlying ban on unauthorized interception, by denying the wrongdoer the fruits of his labor and by eliminating the demand for those fruits by third parties" – "does *not* rely on the communicative impact of speech." *Id.* at 123 (emphasis added; internal quotation marks and citation omitted).

Applying intermediate scrutiny, the court held the "government's interest in protecting privacy by helping maintain the confidentiality of [covered] communications ... is a significant state interest." *Id.* at 125 (internal quotation marks and citation omitted).

In this regard, the use and disclosure proscriptions, according

to United States, furthered government's interests in protecting the privacy of covered communications in two ways: "(1) by denying the wrongdoer the fruits of his labor and (2) by eliminating the demand for those fruits by third parties." *Id.* (internal quotation marks and citation omitted). The court stated the first was inapplicable, because, unlike here, there was no evidence defendants encouraged or participated in the interception. *Id.* Accordingly, with respect to the second, "the connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best." *Id.* at 125-26.

It concluded, therefore, that the use and disclosure provisions, as applied to defendants not connected with the interception, were not narrowly tailored to serve the government's interests. *Id.* at 126. Because persons who indirectly participated in the interception could be punished under the statute, "the government's desired effect can be reached by enforcement of existing provisions against the responsible parties rather than by imposing damages on these defendants." *Id.*

The court distinguished *Boehner* on the ground, among others, that, unlike Yocum, who found the tape of the intercepted conversation in his mailbox, Congressman McDermott, in *Boehner*, entered into a transaction with the interceptors when he accepted the tape from them. *Id.* at 128-29.

On the facts in *Bartnicki* (obviously, quite different from those here), the court concluded "that the government's significant interest in protecting privacy is not sufficient to justify the serious burdens the damages provisions of the Wiretapping Acts place on free speech." *Id.* at 129. It therefore held the Acts "fail the test of *intermediate scrutiny* and may *not* constitutionally be applied to penalize the use or disclosure of illegally intercepted information *where [, unlike here,] there is no allegation that the defendants participated in or encouraged that interception.*" *Id.* (emphasis added).

d.

In the light of the foregoing jurisprudence, we must decide what level of First Amendment scrutiny is appropriate in determining whether defendants can be subject to civil liability for use and disclosure of illegally-intercepted private telephone conversations, which they received directly from the interceptors, *with full knowledge of the circumstances of the interceptions and with some participation concerning the interceptions*. None of the foregoing cases addressed this precise question.

Florida Star is similar to this case in that the Peavys are seeking to hold defendants civilly liable for, inter alia, publication of truthful information. And, the governmental interests supporting the Federal and Texas Acts and the Florida statute are similar in that they seek to protect privacy; accordingly, this case, like *Florida Star*, involves balancing privacy and free press interests.

But, *Florida Star* is distinguishable in numerous ways. Unlike the Florida statute, which restricted speech on the basis of content, the Wiretap Acts, except under certain limited circumstances not present here, prohibit use and disclosure of all illegal interceptions, irrespective of their subject matter. The use and disclosure restrictions are instead based on the manner in which the information is acquired.

The statutes at issue in *Daily Mail* and *Landmark* also were content-based restrictions on speech. We recognize that the Court did not rely on the content-based nature of the statutes in deciding to apply strict scrutiny in those cases. Nevertheless, that distinction exists and is worthy of note, inasmuch as content-based regulations of expression are subject to strict scrutiny, irrespective of whether they prohibit the publication of lawfully-obtained information. *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) ("Our precedents ... apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content").

The statute in *Florida Star* targeted a segment of the media ("any instrument of mass communication"); but, the Federal and Texas Acts do not single out the media for special burdens. Instead, they apply to "any person" who uses or discloses illegally-intercepted communications, if he knows or has reason to know of the interception's illegality. Also unlike the Federal and Texas Acts, the Florida statute did not require proof of scienter.

Moreover, none of the considerations underlying the Court's application of the *Daily Mail* principle in *Florida Star* are present here. The first consideration – government's retention of ample means of safeguarding significant interests upon which publication may impinge – is inapplicable. Unlike the reporter in *Florida Star*, who obtained the victim's name from public records made available by the government (far from it), the contents of the Peavys' conversations had not been entrusted to the government, but were instead given to defendants by private individuals who intercepted them illegally. "To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired." *Florida Star*, 491 U.S. at 534.

Moreover, in the light of our affirming that, as a matter of law, defendants violated the use and disclosure provisions, they knew or should have known the interceptions were illegal. In addition, defendants had some participation concerning the interceptions. (Moreover, there are material fact issues for whether they "procured" or "obtained" the Harmans to make the illegal interceptions. This bears also on defendants' knowledge of illegal interceptions.) Therefore, as noted, it is quite arguable that defendants did not lawfully receive the contents of the tapes. *See Boehner*, 191 F.3d at 479 (Ginsburg, J., concurring) (even if the receipt of the tape containing the illegally intercepted call was lawful, "one who obtains information in an illegal transaction, with full knowledge the transaction is illegal, has not

'lawfully obtained' that information in any meaningful sense").

The second *Florida Star* consideration – "the fact that punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which [government] seeks to act," *id.* 491 U.S. at 535 – is likewise inapplicable, because the contents of the Peavys' conversations were not publicly available or in the public domain when defendants received, used, and disclosed them.

The final *Florida Star* consideration -- "the timidity and self-censorship which may result from allowing the media to be punished for publishing certain truthful information," *id.* (internal quotation marks and citation omitted) – presents a somewhat closer question. Nevertheless, the Court's concern in that respect seemed to be limited to "information released, without qualification, by the government." *Id.* 491 U.S. 524 at 536. "A contrary rule, depriving protection to those who rely on the government's implied representations of the lawfulness of dissemination, would force upon the media the onerous obligation of sifting through government ... pronouncements to prune out material arguably unlawful for publication." *Id.* Here, the only representation government has made regarding the lawfulness of use and disclosure of illegal interceptions is in the Federal and Texas Acts prohibiting such conduct. Again, that prohibition applies only if the using or disclosing person does so "intentionally", and "knows or has reason to know" the interceptions were illegal.

Accordingly, the Acts do not impose an "onerous obligation" on the media. Instead, it is subject to the obligation imposed on all citizens: the duty not to use or disclose interceptions, knowing or having reason to know they were in violation of the Wiretap Acts.

In the light of that scienter requirement, we think it highly unlikely such an obligation will result in "timidity and self-censorship" because, as stated in the *Bartnicki* dissent:

> One would suppose that a responsible journalist ... would be unlikely to propose publication of a ... conversation without some effort to insure that [it] in fact took place and to authenticate the identities of the parties to [it]. As part of such an inquiry, the question whether the parties to the conversation had authorized its recording and release, or whether others had lawfully intercepted the conversation, would seem naturally to arise. Moreover, current technology would make it relatively easy to determine whether the conversation had been the subject of a prior press or broadcast report.

Bartnicki, 200 F.3d at 135 (Pollak, J., dissenting). These observations are all the more compelling here, in that defendants had some participation concerning the interceptions.

Finally, and perhaps most important, is *Florida Star* footnote eight: "The *Daily Mail* principle *does not settle the issue whether, in cases where information has been acquired unlawfully* by a newspaper or *by a source*, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." *Id.* 491 U.S. 524 at 535 n.8 ("unlawfully" emphasized in original; other emphasis added). Expressly reserved was the question at issue here. But, as a member of the majority observed separately in *Boehner*, the *Branzburg* Court may have shed some light on the answer to that question: the First Amendment "does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to other persons." *Boehner*, 191 F.3d at 473 (separate opinion of Randolph, J. (quoting *Branzburg*, 408 U.S. at 691-92) (emphasis added)).

Likewise, the intermediate scrutiny cases advanced by the Peavys and the United States are distinguishable. The statute at issue in *O'Brien* was targeted at conduct (proscribed knowingly destroying draft card) and imposed no restrictions on the media's publication of truthful information. And, the publication

restriction in *Cohen* was self-imposed.

Bartnicki and *Boehner* are also distinguishable. Media liability for publication was not at issue in Boehner; and the media defendants in *Bartnicki*, unlike Riggs and WFAA, were not in any way involved with the interceptors, or the interceptions, but instead received the interceptions from a third party, in whose mailbox the anonymous interceptor had left the tape of the intercepted communications.

Considering these cases, and the distinctions between them and the case at hand, we conclude that the use and disclosure provisions, as applied to Riggs and WFAA, must satisfy "the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech." *Turner*, 512 U.S. at 662.

Along this line, we reject defendants' contention that the Federal and Texas Acts impose more than an "incidental" burden on the gathering and reporting of news.

According to defendants, a burden on the media can be characterized as "incidental" only if it indirectly affects newsgathering and publication, or subjects the media to non-discriminatory economic regulation. Defendants claim the Acts directly affect newsgathering and reporting because they completely proscribe use and disclosure of all contents of interceptions.

Defendants interpret too broadly what constitutes an "incidental" effect. The Acts restrict use and disclosure of information based solely on the means by which it is acquired, and the restriction applies only if the using or disclosing person knows, or has reason to know, of the illegal manner of acquisition. Accordingly, the Acts do not prohibit gathering and publishing the same information, acquired from other sources.

2.

Under *O'Brien*'s intermediate scrutiny analysis, "a content-neutral regulation [such as the Federal and Texas

Wiretap Acts] will be sustained if" the regulation

> furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Turner, 512 U.S. at 662 (quoting *O'Brien*, 391 U.S. at 377).

The Wiretap Acts satisfy intermediate scrutiny, according to the United States and the Peavys, because: (1) the United States and Texas each have a substantial interest in maintaining the confidentiality of private communications; (2) the use and disclosure proscriptions are unrelated to the suppression of speech, because liability is based on the means of acquisition of the information, rather than the content, and the Acts do not single out speech for special burdens, but prohibit all unauthorized uses and disclosures; and (3) the incidental burdens on speech are not impermissibly broad, because disclosure is not singled out for special burdens, and the Acts do not prohibit the use or disclosure of the same information obtained by non-prohibited means.

The use and disclosure provisions, in defendants' view, fail intermediate scrutiny because they impose an absolute, categorical ban on speech and expressive conduct, which burdens substantially more speech than is necessary to further government's legitimate interests in protecting privacy.

a.

One of the "dual purposes" of the Federal Act is "protecting the privacy of [covered] communications." *Gelbard v. United States*, 408 U.S. 41, 48 (1972) (quoting S. Rep. No. 1097, 90th Cong., 2d Sess., 66 (1968)); *see also United States v. Cianfrani*, 573 F.2d 835, 855 (3d Cir. 1978) ("protection of privacy was an overriding congressional concern" in enacting Federal Act). It

does so by proscribing not only unauthorized interception, § 2511(1)(a), but also the intentional use and disclosure of illegal interceptions, § 2511(c) and (d). The purpose of the use and disclosure proscriptions is to reinforce the interception proscription by "denying the wrongdoer the fruits of his conduct," *Fultz*, 942 F.2d at 401, and by eliminating the demand for those fruits by third parties. *Boehner*, 191 F.3d at 469-70.

> [P]rotection of the privacy of communications is vital to our society. We depend upon the free interchange of ideas and information. And we are dedicated to the proposition that each individual should be free from unwarranted intrusion into his private affairs. Both these interests are threatened by modern techniques of electronic surveillance, however, since it is now possible to record surreptitiously the most intimate conversations and to preserve them for later disclosure. Only by governing strictly both authorization [of interception] and disclosure of intercepted communications did Congress believe that such weighty interests could be protected adequately.

Cianfrani, 573 F.2d at 856.

The privacy interests protected by the Wiretap Acts are of constitutional dimension. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (although "essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas", there is "a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect" (emphasis in original)); *Katz v. United States*, 389 U.S. 347, 352-53, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967) (Fourth Amendment protects privacy of telephone conversation from governmental intrusion by electronic surveillance).

And, the privacy interests sought to be protected by the Federal Act have been held to be "sufficiently weighty to justify some limitations in certain circumstances on the general right of

access to court proceedings." *Cianfrani*, 573 F.2d at 856-57 (ordering pretrial hearings closed to public to extent reasonably necessary to protect against disclosure of unlawfully intercepted communications). *See also In re Grand Jury*, 111 F.3d 1066, 1074-75 (3d Cir. 1997) (privacy interests protected by Federal Act confer standing on wiretapping victims to quash subpoena duces tecum served on interceptor, who was a witness in grand jury investigation in which one of wiretapping victims was target).

In short, the United States and Texas have a substantial interest in protecting the confidentiality of private wire, oral, and electronic communications.

b.

And, that substantial interest is unrelated to the suppression of free expression. The use and disclosure proscriptions are directed only at the means by which information is acquired. They apply only if the targeted actor knows, or has reason to know, of the illegal means of acquisition. And, they do not prohibit use and disclosure of the information contained in illegal interceptions if such information is obtained from another source. Indeed, protection of communications' confidentiality encourages, rather than suppresses, free expression, because the proscriptions against interception, use, and disclosure offer assurance to communicating parties that they can speak freely.

c.

To satisfy the requirement that the incidental restriction on First Amendment freedom is no greater than essential to furtherance of the governmental interest, "a regulation need not be the least speech-restrictive means of advancing the Government's interests. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less

effectively absent the regulation." *Turner*, 512 U.S. at 662 (internal quotation marks and citations omitted). "Narrow tailoring in this context requires ... that the means chosen do not burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* (internal quotation marks and citation omitted).

The use and disclosure proscriptions do not burden substantially more speech than is necessary to further governmental interests in protecting the privacy of communications. Those interests would be achieved less effectively in the absence of such proscriptions, because the invasion of privacy that occurs with interception does not then end, but continues anew and spreads with each disclosure or other use of the interception.

Prohibiting interception alone is not sufficient to protect the privacy of communications. Without the use and disclosure proscriptions, government's efforts to prohibit interception would be far less effective, because a person who illegally intercepts a conversation and wishes to disclose it to the public can do so, at no risk to himself, by simply anonymously providing the contents of the communication -- by use of a tape or otherwise -- to third parties, such as the media, who have an interest in disclosing, or otherwise using, those contents (as in Bartnicki). Moreover, far greater damage to the interests sought to be protected results if, and when, such contents are paraded before the public through use and disclosure by non-interceptors, including themedia. *See Boehner*, 191 F.3d at 468, 470.

In sum, as applied to the facts in this case, including defendants' knowing or having reason to know the interceptions were illegal (to include their participation concerning the interceptions and their possible "procures" or "obtains" violations), the use and disclosure provisions of the Federal and Texas Acts satisfy intermediate scrutiny, because: they further substantial governmental interests in protecting the confidentiality of private communications; those interests are unrelated to the suppression of free expression, but instead

encourage it; and the incidental burdens on free expression are no greater than is essential to the furtherance of those interests, which would be achieved far less effectively in the absence of the proscriptions.

E.

We reject defendants' alternative contention that the summary judgment should be affirmed because the Federal and Texas Acts are unconstitutionally vague and overbroad.

1.

The use and disclosure provisions give adequate notice of the conduct they prohibit, and are "not so vague that men of common intelligence must necessarily guess at [their] meaning". *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973) (internal quotation marks and citation omitted). As Riggs admitted in his deposition, there was nothing in the amended legislation that was vague or ambiguous; instead, Watler simply "missed the new legislation." Accordingly, if defendants misunderstood their legal obligations, it was because they and their attorney were unaware of the Acts' terms, not because they were vague. Defendants' contention that the distinction between "use" and "disclose" is unclear carries very little weight; each is subject to the same proscriptions and exceptions, and triggers the same penalties.

2.

The Acts are not unconstitutionally overbroad, because they do not sanction a substantial amount of constitutionally protected speech. The use and disclosure proscriptions do not prohibit such conduct for information obtained by means other than illegal interceptions. And, the scienter requirements ameliorate the possibility that the prohibitions will result in chilling a substantial amount of protected speech.

F.

As noted, under the statutory exclusionary rule, § 2515, contents of illegally intercepted communications, as well as evidence derived therefrom, are not admissible in "any trial" if disclosure would violate the Federal Act. The Peavys contend the district court erred, in conjunction with the cross motions for summary judgment, by denying their motion to suppress the contents of the interceptions and evidence derived therefrom, and by allowing defendants to use such evidence to attack the Peavys' character and defend against their state law claims, as well as to support their (defendants') affirmative defenses.

In the light of our disposition of the other issues, we need not address this issue. The suppression motion ruling was only for summary judgment purposes. The district court has had no occasion to consider admissibility vel non of such evidence for trial.

III.

For the foregoing reasons, we AFFIRM the summary judgment insofar as it (1) dismissed the Peavys' claim for damages, under the Federal Act, for defendants' "procuring" the Harmans to make the interceptions, and (2) held, for contexts other than for their television broadcasts, that, in violation of the Federal and Texas Acts, defendants "used" and "disclosed" the contents of the intercepted communications; REVERSE the summary judgment insofar as it (1) applied strict scrutiny and (2) held that the First Amendment precludes, under the Federal and Texas Acts, holding defendants civilly liable for "use" and "disclosure"; VACATE the summary judgment insofar as it (1) held that, under the Federal Act, defendants had not "procured" the Harmans to make the interceptions (this being a separate issue from the correct dismissal of the procurement action for damages), (2) dismissed the Peavys' claim, under the Texas Act, for so "obtaining" the Harmans, (3) dismissed the Peavys' claim,

under Texas law, for civil conspiracy, and (4) held that, in violation of the Federal and Texas Acts, defendants, in their television broadcasts, "disclosed" the contents of the interceptions; and REMAND for further proceedings consistent with this opinion.

AFFIRMED in part; REVERSED in part; VACATED in part; and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CARVER DAN PEAVY, et al., Plaintiffs,

v.

CHARLES JAMES HARMAN, SR., et al., Defendants.

CARVER DAN PEAVY, et al., Plaintiffs,

v.

WFAA-TV, INC., et al., Defendants.

Nos. Civ.A. 3:96-CV-1506-R, 3:96-CV-2945-R

February 18, 1999, Filed;
February 19, 1999, Entered on Docket

ORDER

BUCHMEYER, Chief Judge.

This Court has made an independent review of the Findings and Recommendation ("Findings and Recommendation") of the United States Magistrate Judge, rendered on October 15, 1998, as well as the Objections to the Findings and Recommendation, and the relevant portions of pleadings, files, and records in this case. The Court concludes that the Findings and Recommendation of the Magistrate Judge are correct and they

are adopted as the Findings and Conclusions of this Court.

In Civil Action No. 3:96-CV-1506-R, the parties' motions for summary judgment are GRANTED IN PART AND DENIED IN PART. Defendants' are entitled to judgment as a matter of law of Plaintiffs' common law claims for public disclosure of private facts, intentional infliction of emotional distress, tortious interference with contractual relations, and civil conspiracy. Plaintiffs are entitled to judgment as a matter of law on their claims against the Harmans for violations of 18 U.S.C. § 2510 ("Title III"), the Texas Wiretap Act, Tex. Civ. Prac. & Rem. Code Ann. § 123.001, and for invasion of privacy by intrusion. This action will proceed to trial on the issue of damages and whether the Defendants intentionally disclosed the contents of the "Race Tape" in violation of Title III and the Texas Wiretap Act.

In Civil Action No. 3:96-CV-2945-R, Defendants' Motion for Summary Judgment is GRANTED, and Plaintiffs' Motion for Summary Judgment is DENIED. All claims against the Defendants are dismissed with prejudice.

It is so ORDERED.

Signed on this 18 day of February 1999.

CHIEF JUDGE JERRY BUCHMEYER
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

FINAL JUDGMENT

For the reasons stated in the Findings and Recommendation of the United States Magistrate Judge and this Court's Order adopting the Findings and Recommendation as the Findings and Conclusions of this Court, and pursuant to Rule 58 of the Federal Rules of Civil Procedure,

IT IS HEREBY ORDERED that judgment be entered in favor of Defendants. All claims of Plaintiffs against Defendants are hereby DISMISSED WITH PREJUDICE. Costs are awarded to Defendants.

It is so ORDERED.

Signed on this 18 day of February 1999.

CHIEF JUDGE JERRY BUCHMEYER
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

KAPLAN, United States Magistrate Judge.

These cases have been consolidated for pretrial purposes and are before the Court on cross-motions for summary judgment. The motions have been referred to United States Magistrate Judge Jeff Kaplan for recommendation pursuant to 28 U.S.C. § 636(b).

I.
BACKGROUND

This case started with the breakdown of common civility between neighbors. It led to a public scandal that resulted in a highly publicized criminal trial and spawned at least thirteen different civil lawsuits.[1] The facts are relatively simple and straightforward. Succinctly stated, plaintiffs got caught with their

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[1] Dan Peavy v. New Times, Inc., No. 3-96-CV-0547-R (N.D. Tex., filed February 26, 1996); Dan Peavy, et al. v. Charles Harman, et al., No. 96-CV-1506-BD (N.D. Tex., filed May 28, 1996); Dan Peavy, et al. v. WFAA-TV, et al., No. 96-CV-2945-R (N.D. Tex., filed October 25, 1996); Eugene Oliver, et al. v. WFAA-TV, et al., No. 3-96-CV-3436-L (N.D. Tex., filed December 30, 1996); Dan Peavy v. Dallas Independent School District, et al., No. 97-CV-2163-L (N.D. Tex., filed September 3, 1997); Amy Peavy v. Charles Harman, No. 3-97-CV-2685-BD (N.D. Tex., filed November 3, 1997); Houston Goodspeed v. Charles Harman, No. 3-97-CV-2681-BD (N.D. Tex., filed November 3, 1997); Sue Kendrick v. Charles Harman, No. 3-97-CV-2682-BD (N.D. Tex., filed November 3, 1997); John Kendrick v. Charles Harman, No. 3-97-CV-2683-BD (N.D. Tex., filed November 3, 1997); Virginia Moore v. Charles Harman, No. 3-97-CV-2686-BD (N.D. Tex., filed November 3, 1997); Don Timberlake v. Charles Harman, No. 3-97-CV-2684-BD (N.D. Tex., filed November 3, 1997); Dave Richardson v. Charles Harman, No. 3-97-CV-2739-BD (N.D. Tex., filed November 7, 1997); James Stephenson v. Charles Harman, No. 3-97-CV-2740-BD (N.D. Tex., filed November 7, 1997).

hands in the "cookie jar" and are upset that the media exposed their misdeeds. However, this case also presents a unique opportunity to further define the parameters of the federal wiretap statute. This legal issue is at the heart of the pending summary judgment motions.

The saga began in December 1994 when Charles Harman purchased a police scanner to monitor criminal activity in his neighborhood. The first time Harman used the scanner he intercepted a signal from a cordless telephone being used by his next-door neighbor, Dan Peavy. Harman overheard Peavy talking to another neighbor about filing a class-action lawsuit against him and his wife.[2] This piqued Harman's interest and he continued to monitor Peavy's phone calls. Later that same day, Harman heard Peavy tell an unidentified party "how much money [he] was making off the insurance policies at DISD." (WFAA Exh. M at 168). Harman thought this conversation was significant since Peavy was a trustee of the Dallas Independent School District.

Harman consulted the scanner manual to determine whether it was legal to tape the intercepted phone calls. The manual suggested that any such inquiries be directed to local law enforcement authorities. Harman decided to contact the Dallas County District Attorney's office. He spoke to Assistant District Attorney Bill Geyer and asked if it was legal to listen to the cordless telephone conversations. Geyer responded, "Absolutely." (C. Harman Aff. ¶ 8). Harman then inquired whether he could record the telephone calls. Geyer said, "Go ahead. Anything over the air is free." (C. Harman Aff. ¶ 8). Based on these assurances, Harman began to make the infamous "Peavy tapes."

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[2] Peavy and Harman have been involved in a number of petty disputes over the years. On one occasion, Peavy sued Harman because he refused to cut back vegetation on his property that obstructed Peavy's view of a lake. More recently, Harman complained to code enforcement officials after Peavy installed high intensity security lights around his house.

Peavy continued to plot with his neighbors against Harman. On one occasion, Peavy offered to put up "$ 10,000 to make sure [a lawsuit] was filed." (C. Harman Aff. ¶ 9). Harman perceived this statement as a threat against his family. He reported this conversation to Geyer who referred him to the Dallas Police Department. Harman spoke with several police officers but was not satisfied with their response. He then called District Attorney John Vance. Harman told Vance about the threats against his family and possible improprieties related to DISD insurance. Vance agreed to meet with Harman after the first of the year.[3] Until then, he instructed Harman to "keep taping." (C. Harman Aff. ¶ 16). Harman believed that he was getting the "run around" from the authorities. His frustrations eventually led him to contact the media.

Harman called WFAA-TV on December 8, 1994. He spoke to P.J. Ward, a field producer and former director of a consumer hot-line known as "Contact 8." Harman said that he had information concerning possible corruption of an unnamed public official. Ward questioned Harman about his allegations and determined that the official was Dan Peavy.[4] The information was passed on to senior reporter Robert Riggs for further investigation. Riggs called Harman later that day. Harman said he had proof that Peavy had threatened to harm him and was involved in an insurance kickback scheme. However, he only wanted to discuss these matters in person at his home.

Riggs met with Harman and his wife on December 9, 1994. Harman played portions of a tape recorded conversation between Peavy and another party wherein they discussed a plan to split commissions on cancer insurance sold to Mary Kay Cosmetics. Riggs was stunned to hear these remarks from a public official.

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[3] Vance met with Harman on January 17, 1995. Also present were Assistant District Attorney Mike Gillett and Investigator Bob Jennings. Harman states that all the participants reassured him that his actions were legal.

[4] Ward was already familiar with Peavy through previous complaints about his home construction business.

Harman indicated that he planned to record future telephone calls and asked Riggs if he wanted copies of the tapes. Riggs said that he did. However, he instructed Harman to leave the recorder running throughout the entire conversation and not to edit the tapes so their authenticity could not be questioned. Riggs also asked Harman whether it was legal to record these conversations. Harman assured him that his actions had been approved by the Dallas County District Attorney and the Dallas Police Department.

Riggs returned to the television station and played portions of the tape for Ward and News Director John Miller. All agreed that there was credible evidence of public corruption that should be investigated. However, they first contacted their attorney to determine whether it was legal to use the tape recordings. Paul Walter told Miller that he could accept and broadcast the tapes. This advice was confirmed in a written legal memorandum dated January 4, 1995.

Thereafter, Harman provided WFAA with 18 tapes containing 188 telephone conversations between Peavy and others. Ward listened to the tapes, took notes, and attempted to transcribe the conversations. However, some of the tapes were of poor quality and difficult to understand. Ward selected relevant portions of the tapes and had them transcribed by a professional court reporter. Copies of the transcripts were furnished to Riggs, Miller, and Walter in February 1995.

Several weeks later, Riggs was informed by a law enforcement source about a recent amendment to the federal wiretap statute. Riggs contacted Watler to determine whether the interception of cordless telephone calls was prohibited under the new law. Watler researched the issue and learned that an October 1994 amendment made it unlawful to intercept the radio portion of a cordless telephone call. He immediately advised WFAA not to accept any additional tapes from Harman, not to broadcast the tapes already in its possession, and not to confront individuals about conversations on the tapes. Riggs returned the original tapes to Harman on or about March 1, 1995. Copies of the tapes

and all related documents were delivered to Watler for safekeeping.

Harman also learned that it was illegal to tape these telephone conversations. FBI Agent Mark Chapman met with Harman on March 14, 1995 and showed him a copy of the new law. Harman mistakenly believed that he could still listen to the phone calls as long as he did not tell law enforcement officials what he heard. Nevertheless, Harman recorded at least one other conversation. He pled guilty to federal wiretap violations and paid a $ 5,000 fine in connection with this recording.

Meanwhile, WFAA continued to investigate Peavy. Riggs learned that Peavy had been appointed by the president of the school board to solicit new bids on group term life and disability insurance for DISD employees. Peavy designated Eugene Oliver as the exclusive insurance agent to obtain these bids. The contracts were ultimately awarded to two companies represented by Oliver. Thereafter, Oliver split his commissions with Peavy and several others. Riggs also uncovered a similar arrangement between Peavy and Oliver involving a cancer insurance policy that Oliver was negotiating with Mary Kay Cosmetics.

The relationship between Peavy and Oliver was the subject of a three-part series broadcast by WFAA in the summer of 1995. Riggs did not mention or play any of the tapes he received from Harman during the broadcasts. On July 31, 1995, DISD Superintendent Chad Woolery announced an investigation into the school district's insurance program. Peavy was ultimately stripped of his authority over insurance procurement, and DISD stopped paying agent commissions on insurance contracts. The FBI conducted a parallel criminal investigation during the same time period. As a result of this investigation, Peavy and Oliver were indicted on more than forty counts of official bribery, conspiracy, and income tax evasion. They were eventually acquitted of all charges.

On September 28, 1995, audiotapes of Peavy's telephone conversations were anonymously distributed to at least three DISD board members. In those conversations, Peavy used

extremely offensive racial epithets, profanity, and derogatory remarks to describe minority students and school district personnel.[5] A written transcript of the tape was prepared and read into the record at a regularly scheduled meeting of the Dallas school board. Peavy resigned from the board a short time later.

The Peavys and Olivers have now filed three separate lawsuits against the Harmans, WFAA, and Robert Riggs.[6] Plaintiffs allege that defendants intercepted, used, and disclosed their private telephone conversations in violation of the federal and state wiretap statutes. Plaintiffs also assert common law claims for invasion of privacy, intentional infliction of emotional distress, tortious interference with contractual relations, and civil conspiracy. Defendants have answered and raised several affirmative defenses. All parties move for summary judgment on their claims and defenses. The legal issues have been fully briefed by the parties and this matter is ripe for determination.

II.
SUMMARY JUDGMENT STANDARD

Summary judgment is proper when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A dispute is "genuine" if the issue could be resolved in favor of either party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Thurman v. Sears, Roebuck & Co.*, 952 F.2d 128, 131 (5th Cir.),

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[5] The contents of this tape are described at length in *Peavy v. New Times, Inc.*, 976 F. Supp. 532, 534-35 (N.D. Tex. 1997). A detailed recitation of these highly offensive remarks is neither necessary nor appropriate to the disposition of the pending motions.

[6] The Peavys sued the Harmans on May 28, 1996. They filed a separate action against WFAA and Riggs on October 25, 1996. The Olivers sued the Harmans, WFAA, and Riggs on December 30, 1996. All three lawsuits arise out of the same facts and have been consolidated for pretrial purposes.

cert. denied, 506 U.S. 845 (1992). A fact is "material" if it might reasonably affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matter of Gleasman*, 933 F.2d 1277, 1281 (5th Cir. 1991).

This case is before the Court on cross-motions for summary judgment.[7] Consequently, each party has the burden of producing evidence to support its motion. *Dutmer v. City of San Antonio*, 937 F. Supp. 587, 589-90 (W.D. Tex. 1996). The movant has the initial burden of showing the absence of a genuine fact issue. *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995). The burden then shifts to the non-movant to show that summary judgment is not proper. *Duckett v. City of Cedar Park*, 950 F.2d 272, 276 (5th Cir.). Either party may satisfy its evidentiary burden by tendering depositions, affidavits, and other competent summary judgment evidence. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992). All evidence must be viewed in the light most favorable to the party opposing the motion. *Rosado v. Deters*, 5 F.3d 119, 122 (5th Cir. 1993). However, conclusory statements and testimony based on conjecture or subjective belief are not competent summary judgment evidence. *Topalian*, 954 F.2d at 1131.

III.
TITLE III-HISTORICAL OVERVIEW

The resolution of this case depends largely on the interpretation of Title III of the Omnibus Crime Control and Safe

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[7] A case may not be appropriate for summary disposition even if the parties have filed cross-motions for summary judgment. *See, e.g. Bricklayers, Masons and Plasterers International Union of America v. Stuart Plastering Co.*, 512 F.2d 1017, 1023 (5th Cir. 1975); *Dutmer*, 937 F. Supp. at 589. The Court must still examine the record to determine whether there are genuine issues of material fact for trial. *John v. State of Louisiana Board of Trustees for State Colleges and Universities*, 757 F.2d 698, 705 (5th Cir. 1985); *Schlytter v. Baker*, 580 F.2d 848, 849 (5th Cir. 1978).

Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510, et seq. ("Title III").[8] Title III imposes criminal and civil liability upon any person who:

> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
>
> * * * *
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; [or]
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> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection . . .

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[8] Plaintiffs also assert claims under the Texas Wiretap Act, TEX. CIV. PRAC. & REM. CODE ANN. § 123.001, et seq. (Vernon 1986). The statute provides, in pertinent part:

> A party to a communication may sue a person who:
> (1) intercepts, attempts to intercept, or employs or obtains another to intercept or attempt to intercept a communication; [or]
> (2) uses or divulges information that he knows or reasonably should know was obtained by interception of the communication.

Id. § 123.002(a)(1)-(2). The Texas statute does not contain an intent element and differs from the federal statute only in that limited respect.

18 U.S.C. § 2511(1). The statute also provides for the suppression of any evidence obtained by use of an illegal wiretap:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Id. § 2515; *see also id.* § 2518(10)(a)(i).

Title III was intended to broadly ban the use of wiretaps and any evidence derived therefrom. The decision to create such extensive remedies can be traced to the historical shortcomings of the federal wiretap laws. Before the enactment of Title III, wiretapping was prohibited by the Federal Communications Act of 1934, 47 U.S.C. § 605. However, the statute applied only to federal law enforcement agents. Private parties were free to employ wiretaps with impunity. See Note, Should "Clean Hands" Protect the Government Against § 2515 Suppression Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968?, 53 WASH. & LEE. L. REV. 1473, 1476 & nn.13-15 (1996), citing 1 J. GARR, THE LAW OF ELECTRONIC SURVEILLANCE § 2.1 (2d ed. 1986). In 1967, the Supreme Court addressed the constitutional implications of wiretap activities when it held that the use of electronic surveillance by law enforcement officials could violate the constitutional right of privacy under the Fourth Amendment.[9] *Katz v. United States*,

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[9] *Katz* and *Berger* effectively overruled *Olmstead v. United States*, 277 U.S. 438 (1928). *Olmstead* was often cited for the proposition that wiretapping did not violate the Fourth Amendment because it involved neither a physical

389 U.S. 347 (1967); *Berger v. New York*, 388 U.S. 41 (1967).

Title III was enacted to correct deficiencies in the existing law and address the concerns expressed in *Berger* and *Katz*. The statute has two purposes: (1) to protect the privacy of wire and oral communications; and (2) to delineate on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. S.Rep. No. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S.C.C.A.N. 2112, 2153. The legislative history clearly indicates that Congress intended a broad ban on the use of electronic surveillance to adequately protect privacy interests:

> It is not enough, however, just to prohibit the unjustifiable interception, disclosure, or use of any wire or oral communications. . . . All too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages.

Id. at 2156. At the same time, Title III specifically delineates a narrow set of circumstances under which law enforcement authorities can obtain valid wiretaps and use wiretap information. *See* 18 U.S.C. §§ 2516-2519.

Title III originally covered only wire and oral communications. However, the rapidly growing number of non-wire technologies such as e-mail, cellular phones, paging devices, and computer-to-computer data transmissions eventually

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intrusion nor the seizure of tangible property. However, *Katz* recognized that "the underpinnings of *Olmstead* . . . have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." *Katz*, 88 S. Ct. at 512.

rendered the statute "hopelessly out of date." S.Rep. No. 541, 99th Cong., 2d Sess., reprinted in 1986 U.S.C.C.A.N. 3555, 3556, 3562-65. Congress responded with the Electronic Communications Privacy Act of 1986. However, this legislation specifically exempted "the radio portion of a cordless telephone communication transmitted between the cordless handset and the base unit" from the protections of Title III. *Id.* at 3566, 3568. Congress reasoned that "because communications made on some cordless telephones can be intercepted easily with readily available technologies, such as an AM radio, it would be inappropriate to make the interception of such a communication a criminal offense." *Id.* at 3566.

Congress revisited the issue in 1994. It found that "'the cordless phone, far from being a novelty item used only at 'poolside,' has become ubiquitous . . . More and more communications are being carried out by people [using cordless phones] in private, in their homes and offices, with an expectation that such calls are just like any other phone call.'" H.Rep. No. 827, 103d Cong., 2d Sess., reprinted in 1994 U.S.C.C.A.N. 3489, 3497. Accordingly, Title III was amended to bring cordless telephones within the protections of the statute. *Id.* at 3498, 3510. This amendment became effective on October 25, 1994, just five weeks before Harman purchased his police scanner and began to record Peavy's telephone calls.

IV.
EVIDENTIARY ISSUES

Plaintiffs have filed a motion to suppress most of the summary judgment evidence submitted by defendants. They argue that this evidence was obtained in violation of the federal wiretap statute and must be excluded under 18 U.S.C. § 2515. Each party also has objected to portions of various affidavits and depositions excerpts. The Court will address these evidentiary issues at the outset.

A. Motion to Suppress

An aggrieved person may file a motion to suppress the contents of a wire or oral communication intercepted in violation of Title III and any evidence derived therefrom. *See* 18 U.S.C. §§ 2515 & 2518(10)(a). An "aggrieved person" is one who was a party to an intercepted communication or against whom the interception was directed. *Id.* § 2510(11); *United States v. Scasino*, 513 F.2d 47, 49 (5th Cir. 1975). The "contents" of a communication subject to suppression "include any information concerning the substance, purport, or meaning of" the communication. 18 U.S.C. § 2510(8).

Plaintiffs clearly have standing to file a motion to suppress. However, their attempt to preclude any use of the tapes in this summary judgment proceeding "puts the cart before the horse."[10] The Court must first find a Title III violation before the exclusionary rule is applicable. *See id.* § 2518(10)(a)(i).

Moreover, both parties must rely on the tapes to prove their claims and affirmative defenses. Plaintiffs cannot establish a cause of action under the federal wiretap statute unless they compare the contents of the tapes with the contents of any alleged uses or disclosures.[11] The media defendants need the tapes to prove that the issues discussed therein involve matters of public significance, a key element of their First Amendment defense. Finally, the necessity defense raised by Harman directly implicates the contents of the tapes. The Court concludes that defendants may use the tapes to defend themselves against the claims made the basis of this suit. *See McQuade v. Michael Gassner Mechanical & Electrical Contractors, Inc.*, 587 F.

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[10] Plaintiffs rely on *Gelbard v. United States*, 408 U.S. 41 (1972). However, the *Gelbard* Court assumed that the wiretaps at issue violated Title III. *Gelbard*, 92 S. Ct. at 2360. This Court is unable to make such an assumption.

[11] Plaintiffs recognize that they need this evidence to establish their cause of action and have submitted transcripts of four tapes in support of their motion for summary judgment. (Plf. Exh. A-1).

Supp. 1183, 1190-91 (D. Conn. 1984) ("Section 2515 was no more designed to keep defendants in lawsuits brought under § 2520 from defending the alleged violations of § 2511 than it was to keep the government from prosecuting violators under § 2511.").

An "adjudicatory exception" to Title III is not without precedent. It is well settled that the government may use and disclose illegally intercepted information to investigate and prosecute a criminal defendant charged with violating the wiretap laws. *See Chandler v. United States Army*, 125 F.3d 1296, 1302 n.2 (9th Cir. 1997); *Forsyth v. Barr*, 19 F.3d 1527, 1544 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994); *United States v. Underhill*, 813 F.2d 105, 112 (6th Cir.), *cert. denied*, 482 U.S. 906, and *cert. denied*, 483 U.S. 1022, and *cert. denied*, 484 U.S. 846, and *cert. denied*, 484 U.S. 821 (1987); *United States v. Liddy*, 354 F. Supp. 217, 221 (D.D.C. 1973), *aff'd*, 166 U.S. App. D.C. 95, 509 F.2d 428 (D.C.Cir. 1974), *cert. denied*, 420 U.S. 911 (1975). Other federal courts have extended this exception to civil cases. *Williams v. Poulos*, 11 F.3d 271, 286 (1st Cir. 1993); *McQuade*, 587 F. Supp. at 1188. This Court now follows suit. The motion to suppress should be denied.

B. Objections

The parties also raise numerous objections to each other's summary judgment evidence.[12] Much of this evidence is unnecessary to the disposition of the pending motions and will not be considered. This renders most of the objections moot. However, the Court has found it necessary to rely on certain portions of the affidavits and deposition testimony of Charles Harman, Wilma Harman, Robert Riggs, P.J. Ward, and Paul Watler. (C. Harman Aff. ¶¶ 8-10, 12, 13, 16, 19, 25, 27, 32; C.

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[12] Some of plaintiffs' objections mirror the arguments raised in their motion to suppress. These objections should be overruled for the reasons stated in Part IV-A of this opinion.

Harman Dep. at pp. 62-63, 73, 82, 107, 129, 168-76, 184; W. Harman Aff. ¶¶ 5-7, 9, 10, 13, 15, 17; W. Harman Dep. at pp. 45, 49, 56; WFAA Exh. D ¶¶ 5, 6, 7-10, 13, 24, 39, 40; WFAA Exh. E pp. 7, 9, 17, 18; WFAA Exh. F pp. 6, 24). Plaintiffs object to this evidence on hearsay grounds. The Court finds that the statements go to the state of mind of the defendants and thus fall within a well-recognized exception to the hearsay rule. FED. R. EVID. 803(3); *see also United States v. Williams*, 993 F.2d 451, 457 (5th Cir. 1993). Accordingly, these objections should be overruled.

V.
LIABILITY UNDER TITLE III

Plaintiffs allege that the Harmans intercepted, used, and disclosed their private telephone conversations in violation of Title III. They further contend that the media defendants illegally procured the interceptions and used and disclosed the contents of the tapes. All defendants argue that they lacked the requisite intent to violate the statute. Moreover, the media defendants deny any use or disclosure of the communications. The Court will consider these arguments in turn.

A. Intent

Title III prohibits the intentional interception of wire, oral, or electronic communications. 18 U.S.C. § 2511(1)(a). It also prohibits the intentional use or disclosure of such communications if the defendant knows or has reason to know that the communication was intercepted in violation of the statute. *Id.* § 2511(c) & (d). Defendants argue that all their actions were informed by the opinions of law enforcement authorities or the advice of counsel. They reason that this negates any intent to violate the law.

The federal wiretap statute contains two different mental state requirements depending on the type of violation alleged. The

Court will examine each one separately.

1.

Title III imposes liability upon any person who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a). The Harmans contend that this subsection requires proof of a specific intent to violate the law. Their argument goes something like this. Title III creates a civil remedy for the violation of a criminal statute. As a result, plaintiffs should be required to prove criminal intent in order to establish their cause of action. Mens rea, or "evil mind," is an essential part of criminal intent. It therefore follows that good faith reliance on the advice of law enforcement officials negates such intent.

The premise of this argument is fundamentally flawed. The mere fact that Title III provides a civil remedy for the violation of a criminal statute does not mean that a defendant is entitled to criminal protections. Congress may impose both criminal and civil liability for the same conduct. *United States v. Ward*, 448 U.S. 242, 250 (1980); *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938). Whether a particular penalty is civil or criminal is a matter of statutory construction and involves a two-part test. The first question is whether Congress expressly or implicitly denominated the penalty as civil or criminal. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364 (1984); *Ward,* 100 S. Ct. at 2641. If Congress intended to establish a civil penalty, the Court must then determine whether "the statutory scheme [is] so punitive either in purpose or effect as to negate that intention." *Ward,* 100 S. Ct. at 2641.

The first prong of the test is easily satisfied. Title III contains a remedial provision that expressly authorizes the recovery of civil damages. 18 U.S.C. § 2520. However, this does not end the inquiry. The Court must still determine whether the civil damages provision creates a criminal punishment despite the

expressed intentions of Congress. In making this determination, the Court must consider whether the civil penalty: (1) involves an affirmative disability or restraint; (2) has historically been regarded as punishment; (3) requires proof of scienter; (4) promotes the traditional aims of punishment; (5) applies to behavior that is already a crime; (6) is rationally related to an alternative purpose; and (7) is excessive in relation to the alternative purpose assigned. *See Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 493 (1997), citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). "Only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Ward*, 100 S. Ct. at 2641-42.

Consideration of these factors compels the conclusion that the remedial aspects of Title III do not constitute a criminal penalty. The first two factors weigh heavily in favor of this result. The civil damages provision does not involve an "affirmative restraint" such as imprisonment. *See Grossfeld v. Commodity Futures Trading Commission*, 137 F.3d 1300, 1303 (11th Cir. 1998). Instead, it provides for monetary damages. This type of relief has not historically been regarded as punishment. *Hudson*, 118 S. Ct. at 496. The third factor--whether scienter is an element of a civil violation--begs the question and cannot be considered. The fourth factor requires an assessment of whether the civil penalty promotes the traditional aims of criminal punishment. The primary goal of the civil statute is to compensate victims of illegal wiretap activities. Although the threat of a large damage award may also promote deterrence, this is not outcome determinative. *Id.* The sixth and seventh factors implicate any alternative purpose for the law. Title III was intended to broadly protect the right to privacy. 1968 U.S.C.C.A.N. at 2156. Penalizing those who intrude on this right is rationally related to a legitimate non-punitive purpose. Moreover, the civil penalty is limited to actual damages sustained by the victim or statutory damages based on the duration of the violation. 18 U.S.C. § 2520(b) & (c)(2). The

remedial provision of Title III is not excessive in relation to the alternative purpose of the statute. *See Grossfeld*, 137 F.3d at 1303 & n.7 (penalty provision allowing agency to tie amount of penalty to gravity of violation not excessive on its face). The Court recognizes that the civil statute applies to behavior that is already a crime. However, this fact alone is insufficient to transform an expressly civil penalty into a criminal sanction. *Hudson*, 118 S. Ct. at 496; *see also Ward*, 100 S. Ct. at 2641-42.

Title III does nothing more than create a tort-like remedy for the violation of a criminal statute. Intentional torts typically require proof that the actor desires the consequences of his act or reasonably believes that such consequences are likely to result from his conduct. RESTATEMENT (SECOND) OF TORTS § 8A (1965). Whether the Harmans knew their actions were illegal is irrelevant.

The Court would reach the same conclusion even if criminal intent were an essential element of a civil action under Title III. Criminal intent can be either specific or general. Only a specific intent crime requires proof of an intent to violate the law. A general intent crime merely requires proof of intent to engage in conduct that violates the law, knowing that the consequences are substantially certain to result. *See United States v. Reese*, 2 F.3d 870, 880-81 (9th Cir. 1993), *cert. denied*, 510 U.S. 1094 (1994), citing *Screws v. United States*, 325 U.S. 91, 96, 104 (1945). The issue thus becomes whether a violation of Title III is a specific or general intent crime.

The Court concludes that a criminal violation of the federal wiretap statute only requires proof of general intent. Title III prohibits the "intentional" interception of protected communications. 18 U.S.C. § 2511(1)(a). Use of the term "intent" in a criminal statute is usually indicative of a general intent crime. *See, e.g. United States v. Baker*, 807 F.2d 427, 428-29 (5th Cir. 1986) (criminal statute that requires act to be committed "intentionally" and "knowingly" does not require proof that defendant knew his action violated the law). By contrast, use of the term "willful" to describe a requisite mental

state requires proof of specific intent. *See Screws*, 65 S. Ct. at 1037; *see also United States v. Davis*, 132 F.3d 1092, 1094 (5th Cir. 1998) (approving jury instruction defining "willfully" as meaning "that the act was committed voluntarily and purposely with the specific intent to do something the law forbids; that is to say, with bad purpose whether to disobey or disregard the law.").

Moreover, the law presumes that criminal statutes require only general intent "in the absence of an explicit statement that a crime requires specific intent." *United States v. Hicks*, 980 F.2d 963, 974 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1618, and *cert. denied*, 508 U.S. 941, 113 S. Ct. 2417 (1993). This presumption is particularly relevant in light of a 1986 amendment to the federal wiretap statute. Section 2511(1) originally required proof of a "willful" violation. However, Congress amended the statute to prohibit the "intentional" interception of a wire, oral, or electronic communications. *See* 18 U.S.C. § 2511(1). The legislative history indicates that this was done "to underscore that inadvertent interceptions are not crimes." 1986 U.S.C.C.A.N. at 3577. Subsequent judicial decisions make it clear that "intentional" under Title III means simply "not accidental." *See, e.g., Thompson v. Dulaney*, 970 F.2d 744, 748 (10th Cir. 1992); *Ali v. Douglas Cable Communications*, 929 F. Supp. 1362, 1376 (D. Kan. 1996). *See also United States v. Savage*, 564 F.2d 728, 732 (5th Cir. 1977) (Title III did not cover contents of telephone call inadvertently intercepted by switchboard operator).

The summary judgment evidence conclusively establishes that the Harmans acted consciously, as opposed to accidentally, to bring about the consequences of their actions. They used a police scanner to intercept more than 188 private telephone conversations between Dan Peavy and others over a four month period. Only the first interception was truly inadvertent. The Court concludes that Harmans "intentionally" violated section 2511(1)(a), notwithstanding the assurances of law enforcement officials that their conduct was legal.

2.

Title III also prohibits the intentional "use" or "disclosure" of the contents of intercepted communications. 18 U.S.C. § 2511(1)(c) & (d). This implicates a slightly higher state of mind requirement. In order to establish a violation under these subsections, plaintiffs must prove both intentional conduct and that defendants knew or had reason to know that the underlying interception was illegal. *See Forsyth*, 19 F.3d at 1538. Defendants argue they did not know or have reason to believe that the interceptions were illegal because they relied in good faith on the advice of law enforcement officials or legal counsel. At least one federal district court has recognized such a defense under the use and disclosure prongs of the wiretap statute. See *Kratz v. Kratz*, 477 F. Supp. 463, 483 (E.D. Pa. 1979).[13]

This argument has some appeal. However, the Fifth Circuit implicitly rejected a good faith defense in *Forsyth*. The court noted that the knowledge requirement was satisfied if a defendant was aware of "sufficient facts concerning the circumstances of the interception such that he could, with presumed knowledge of the law, determine that the interception was prohibited in light of [Title III]." *Forsyth*, 19 F.3d at 1538 n.21, quoting *Thompson*, 970 F.2d at 749 (emphasis added). Under this standard, plaintiffs are not required to prove that

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[13] *Kratz* was a civil action brought under the federal wiretap statute. Defendant believed that his wife was having an extra-marital affair and asked his attorney whether he could place a wiretap on the family telephone. Counsel researched the applicable law and found a case from another jurisdiction that recognized an spousal immunity exception under Title III. *Kratz*, 477 F. Supp. at 466, citing *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974). However, counsel did not discover a more recent case from his own jurisdiction that rejected such an exception. 477 F. Supp. at 466 n.4, citing *Remington v. Remington*, 393 F. Supp. 898 (E.D. Pa. 1975). The court refused to adopt the spousal exception but recognized a defense of "reasonable reliance upon a judicial interpretation of Title III." 477 F. Supp. at 484.

defendants had actual knowledge that their conduct was illegal. It is undisputed that all defendants knew: (1) the calls were coming from a cordless telephone; and (2) the conversations were being intercepted without the knowledge or consent of the participants. This makes the "use" or "disclosure" of those communications illegal under Title III.[14]

B. Interception and Procurement

Plaintiffs allege that the Harmans intercepted their private telephone conversations and the media defendants procured the interceptions.[15] *See* 18 U.S.C. § 2511(1)(a). Title III defines "interception" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." *Id.* § 2510(4). Charles Harman listened to private telephone conversations between Dan Peavy and others on his police scanner. Most of these conversations were recorded on audio tape. This clearly constitutes an interception under Title III.

The statute does not define the term "procure." Plaintiffs submit that one "procures" an interception when he "in some sort associate[s] himself with the venture, . . . participate[s] in it as in something that he wishes to bring about, [and] . . . seek[s] by his action to make it succeed." *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949). This is the definition cited in the

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[14] The media defendants cite *United States v. Schilleci*, 545 F.2d 519 (5th Cir. 1977) for the proposition that the use and disclosure prongs of the wiretap statute require proof of specific intent. However, the defendant in that case was charged with conspiracy to intercept wire and oral communications. *Id.* at 521. Conspiracy is a specific intent crime. The Court has previously determined that a criminal violation of Title III only requires proof of general intent. *See* Part VII-A(1).

[15] The media defendants did not intercept any communications and are not liable for merely listening to the tapes. *See United States v. Turk*, 526 F.2d 654, 658 (5th Cir.), *cert. denied*, 429 U.S. 823 (1978).

legislative history of the original wiretap statute. 1968 U.S.C.C.A.N. at 2181; *see also Kratz*, 477 F. Supp. at 476 n.30. Defendants suggest that "procure" means to "actively bringing about, causing or instigating something to be done." *Flowers v. Tandy Corp.*, 773 F.2d 585, 590 (4th Cir. 1985). Black's Law Dictionary contains a similar definition. BLACK'S LAW DICTIONARY 1208 (6th ed. 1990) ("To persuade, induce, prevail upon, or cause a person to do something. . . . Procure connotes action and means to cause, acquire, gain, get, obtain, bring about, cause to be done."); *see also Flowers*, 773 F.2d at 590.

Despite superficial differences, both these definitions require some active participation on the part of the defendant. Other federal courts have interpreted the procurement prong of the statute "to ensure not only the operative conducting an illegal surveillance but the [person] who hired him as well." *United States v. Jones*, 542 F.2d 661, 670 n.17 (6th Cir. 1976); *see also Jacobson v. Rose*, 592 F.2d 515, 517-18, 524 (9th Cir. 1978), *cert. denied*, 442 U.S. 930 (1979) (prosecutor who obtained illegal wiretap order held liable for procurement); *Kratz*, 477 F. Supp. at 466 & n.30 (attorney actively participated in interception by telling his client to leave the wiretap in place to obtain further evidence). Thus, the mere fact that the media defendants may have associated with the Harmans and accepted tapes from them is not sufficient to constitute an illegal procurement under Title III.

Plaintiffs argue that the media defendants crossed the line into active participation by encouraging the Harmans to continue taping and showing them how to do it "better." However, the summary judgment evidence does not support this conclusion. Robert Riggs testified:

> A: [Charles Harman] said that he was going to be recording and wanted to know if we wanted tapes. He had--he had explained in the lengthy discussion that we'd had with him before that he had contacted the police

department, that he had discussed it with the district attorney's office and that they had advised him that it was legal to record and that he was going to be taping and we were--we were welcome to the tapes. And I said, 'Certainly, I would like to have copies.'

Q: Okay. Did you tell him anything about how to record?

A: Yes.

Q: What did you tell him?

A: I asked him not to edit conversations, that considering the serious nature of what he said he had heard before and what we heard on the tapes, don't edit the tapes. We don't--we do not want an edited version or clips of conversations, that we want a full and complete record of the conversation so that no one could challenge the authenticity of the tape.

* * * *

A: Well, Mr. Harman asked us if we wanted--wanted copies of the tapes. He indicated that he was going to be taping, that he was extremely concerned for his safety, that his wife was concerned for their safety–

Q: Right.

A: --and said, 'You're welcome to have copies, I'll make you copies.

(Plf. Exh. H at 184-85, 255). No reasonable jury could find that this constitutes evidence of procurement. The Harmans clearly told Riggs that they intended to keep taping. There is no evidence that they would have abandoned this venture had Riggs

not convinced them to continue. *Cf. Kratz*, 477 F. Supp. at 476 n.30. In fact, Wilma Harman confirmed that Riggs did not encourage them:

> Q: And [Riggs] talked to you about what you had heard and other conversations, I take it?
>
> A: Right.
>
> Q: Did he request that you do anything thereafter?
>
> A: No.
>
> Q: Did you tell him, 'Hey, we're going to keep listening; we're going to keep recording'?
>
> A: I think we told him--yeah, we knew we would listen and that we would give him any tapes that we got.

(Plf. Exh. B at 22).

Riggs did tell the Harmans not to turn their tape recorder on and off in the middle of conversations. (Plf. Exh. A at 103). However, this does not constitute evidence of procurement. Riggs made this suggestion to protect the integrity of the tape recordings. He was concerned that someone might question the authenticity of the tapes if portions of conversations were spliced together. Given that the Harmans had already told Riggs they intended to keep taping, his suggestion cannot reasonably be interpreted as active participation in the venture. The media defendants are not liable under section 2511(1)(a) as a matter of law.

C. Use

Title III also prohibits the intentional use of the contents of

illegally intercepted communications. 18 U.S.C. § 2511(1)(d). The term "use" is not defined in the statute or legislative history. Black's Law Dictionary defines "use" as "to employ; to avail oneself of; to utilize, to carry out a purpose of action by means of; to put into action or service, especially to attain an end." BLACK'S LAW DICTIONARY 541. This definition connotes active employment of the contents of the illegally intercepted communication for some purpose. *See Fields v. Atchison, Topeka, and Santa Fe Railway Co.*, 985 F. Supp. 1308, 1314 (D. Kan. 1997), *as amended,* 5 F. Supp. 2d 1160 (D. Kan. 1998). Thus, merely listening to tape recordings of illegally intercepted telephone calls does not constitute a use within the meaning of Title III. *Id.*; *see also Reynolds v. Spears*, 857 F. Supp. 1341, 1345 n.5 (W.D. Arm. 1994), *aff'd*, 93 F.3d 428 (8th Cir. 1996) (defendant did not use tapes by merely overhearing them). *But cf. Thompson v. Dulaney*, 838 F. Supp. 1535, 1547 (D. Utah 1993).[16] Plaintiffs' arguments to the contrary must be rejected,

The media defendants further contend that copying and transcribing the tapes do not constitute uses because these actions merely aided them in listening to the tapes. The Court agrees with this conclusion, but not its premise. The tapes were not copied because the media defendants wanted to passively listen to them. They were reproduced to aid in the further investigation of Peavy and Oliver. Still, plaintiffs must prove that defendants used the contents of the tapes in order to establish a Title III violation. *See* 18 U.S.C. § 2511(1)(d). The contents of an intercepted communication are not actively employed merely by copying or transcribing tapes. Stated differently, the "substance, purport, [and] meaning" of the communications are not "used" when the tapes are copied or transcribed. They are

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[16] The district court in *Thompson* was "not persuaded by the innovative argument that the term 'use,' as utilized in the statute, is an active, rather than a passive term." *Thompson*, 838 F. Supp. at 1547. However, the court cited no authority or rationale to support its conclusion. This Court does not find *Thompson* persuasive and declines to follow it.

merely reproduced. Therefore, defendants are not liable for copying and transcribing the tapes.

However, the summary judgment evidence is replete with examples of how the media defendants used the contents of the tapes in other ways. They analyzed the tapes and compiled relevant portions to be transcribed. (WFAA Exh. F pp. 12, 19). Riggs and Ward made notes and developed leads based on the substance of the intercepted conversations. (Plf. Exh. H at 611, 515-20; Plf. Exh. J at 110-11, 119-25, 157, 1176, 182, 242; WFAA Exh. D pp. 15-20; WFAA Exh. F pp. 12, 16-18). Ultimately, the tapes formed the basis for the broadcasts themselves.[17] The Court concludes that the media defendants actively employed the tapes to further their investigation of Peavy and Oliver. This constitutes "use" within the meaning of Title III.

D. Disclosure

Title III also prohibits the intentional disclosure of the contents of an illegally intercepted communication.[18] 18 U.S.C. § 2511(1)(c). "Disclose" means "to bring into view by uncovering; to expose; to make known; to lay bare; to reveal to

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[17] The media defendants argue that their subsequent actions dissipated the taint of any initial illegality. They point out that the tapes were not played over the air and independent sources were developed for every fact reported. This argument is based on a recognized exception to the exclusionary rule known as the attenuation doctrine. *Nardone v. United States*, 308 U.S. 338, 341 (1939); *United States v. Sheppard*, 901 F.2d 1230, 1234 (5th Cir. 1990). However, the exclusionary rule does not excuse a substantive violation of the law. Whether or not the media defendants used other sources to develop their story, they also used the illegal tapes.

[18] The Texas Wiretap Act uses the term "divulge" instead of "disclose." TEX. CIV. PRAC. & REM. CODE ANN. § 123.002(a)(2). "Divulge' means "to disclose or make known." BLACK'S LAW DICTIONARY 480. The Court therefore concludes that the same conduct is prohibited under both state and federal law.

knowledge; of free from secrecy or ignorance, or make known." BLACK'S LAW DICTIONARY 464. A communication is disclosed every time it is played to a third party who has not yet heard it. *Fultz v. Gilliam*, 942 F.2d 396, 402 (6th Cir. 1991). However, a defendant "need not play the tapes or repeat the conversation is to be liable." *Deal v. Spears*, 980 F.2d 1153, 1158 (8th Cir. 1992). Title III prevents the disclosure of "any information concerning the substance, purport, or meaning" of the communications. *See* 18 U.S.C. § 2510(8) (emphasis added). Therefore, even revealing the general nature of a communication or intimating its contents may constitute an actionable disclosure. *See Deal*, 980 F.2d at 1156.

The media defendants argue there was no disclosure because they did not play, refer to, or summarize the tapes in their broadcasts. However, the broadcasts revealed that Peavy and Oliver were involved in a plan to split commission is on insurance contracts. This information was initially derived from the tapes. Therefore, the media defendants disclosed the "substance, purport, and meaning" of the illegally intercepted communications. The fact that Riggs later obtained the same information from independent sources is irrelevant. See supra n.17.

Nor are the broadcasts themselves the only evidence of actionable disclosures shown in the record. It is undisputed that Charles Harman sent copies of 18 different tapes to Riggs with the intent and knowledge that he would play them. Riggs disclosed the contents of the tapes to P.J. Ward, who selected relevant portions and had them transcribed by a court reporter. Copies of the transcripts were furnished to John Miller and Paul Watler. Riggs and Harman also revealed the contents of the tapes to several law enforcement officials. Harman gave copies of the tapes to District Attorney John Vance, Detective Kevin Navarro, and FBI Agent Mark Chapman. All these actions constitute disclosures under Title III.

However, the Court cannot conclude as a matter of law that the Harmans are liable for disclosure of the "Race Tape" played

at the DISD board meeting on September 18, 1995. Plaintiffs have introduced some evidence that suggests the Harmans sent this tape to three members of the Dallas school board. Portions of the Race Tape are identical to a tape the Harmans made for Riggs. In addition, plaintiffs allege that the type-face on a transcript created by Wilma Harman matches that found on notes that were included with the Race Tape.[19] However, the Dallas County District Attorney, and the FBI all had copies of portions of the Race Tape at the time it was sent to school board members.[20] Moreover, the Harmans vehemently deny that they created or delivered the tape. This genuine issue of material fact precludes summary judgment in favor of either party. *See Leonard v. Dixie Well Service & Supply Inc.*, 828 F.2d 291, 294 (5th Cir. 1987) (credibility determinations cannot be resolved on summary judgment).

In sum, the Court finds that the media defendants used and disclosed the contents of illegally intercepted communications. The Harmans intercepted those communications and disclosed their contents. However, defendants have raised various affirmative defenses in an attempt to escape liability under Title III and Texas Wiretap Act. The Court addresses those arguments next.

VI.
DEFENSES

The media defendants challenge the application of Title III and the Texas Wiretap Act on constitutional grounds. They argue

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[19] Plaintiffs further argue that the FBI concluded that the handwriting on the delivery ticket matched Wilma Harman's. This overstates the evidence. The FBI report raises this possibility. However, "[a] definitive determination could not be reached due to the absence of sufficiently comparable known writing and due to unexplained variation not found on the basis of the available known writing." (Plf. Exh. NN-2 at P000049).

[20] Plaintiffs do not contend that the media defendants disseminated the Race Tape.

that: (1) the First Amendment protects their right to receive, se, and publish truthful information about matters of public significance; (2) any restrictions on routine news gathering and broadcast activities would operate as a prior restraint; and (3) the state and federal wiretap statutes are unconstitutionally vague and overboard. The Harmans also raise several defenses. They contend that: (1) their illegal activities were compelled by necessity; (2) the intercepted communications did not affect interstate commerce; (3) Title III requires proof of a prior criminal conviction before civil liability attaches; and (4) the Texas Wiretap Act does not apply to cordless telephone calls.

A. First Amendment Issues

This case presents a classic conflict between the right to privacy and the right of a free press to publish truthful and newsworthy information. Both rights are plainly rooted in tradition and serve significant government interests. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975). For this reason resolution of conflicts between these rights must "rely[] on limited principles that sweep no more broadly than the appropriate context of the instant case." *The Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989). This fact-intensive analysis is guided by three considerations: (1) whether the media lawfully obtained truthful information about a matter of public significance; (2) whether imposition of liability is necessary to further a state interest of the highest order; and (3) whether punishing the media for publishing truthful information would result in "timidity and self-censorship." 109 S. Ct. at 2609-10, citing *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979) and *Cox Broadcasting*, 95 S. Ct. at 1046-47; *see also Peavy v. New Times, Inc.*, 976 F. Supp. 532, 538 (N.D. Tex. 1997). The Court finds that these considerations must be resolved in favor of the media defendants in this case. Accordingly, Title III and the Texas Wiretap Act are unconstitutional as applied.

1.

The first question is whether the media defendants lawfully obtained truthful information about a matter of public significance. Plaintiffs concede that the information provided to Riggs and WFAA was truthful. The Court will therefore consider whether that information was lawfully obtained and concerned a matter of public significance.

a.

The Court has already found that the Harmans illegally intercepted and taped plaintiffs' private telephone conversations. Copies of the tapes were provided to WFAA and Riggs. Plaintiffs argue that this precludes a determination that the media defendants "lawfully obtained" the information contained on the tapes. This appears to be an issue of first impression. No court has ever addressed whether the government may punish a media defendant for publishing truthful information that has been unlawfully acquired by a source. That issue was specifically reserved by the Supreme Court in *Florida Star*, but is squarely presented here. *See Florida Star*, 109 S. Ct. at 2610 n.8.

The First Amendment does not give the media license to violate the law. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). More specifically, "media defendants to not have a privilege to place unlawful wiretaps." *Boddie v. American Broadcasting Co.*, 881 F.2d 267, 271 (6th Cir. 1989), *cert. denied*, 493 U.S. 1028 (1990). It is beyond question that the First Amendment would not protect the media defendants from liability had they violated the interception or procurement prongs of Title III. However, such is not the case here. The question is whether the First Amendment protects the media defendants in publishing truthful information acquired by the Harmans in violation of the federal and state wiretap statutes. The Court concludes that it does.

As previously discussed, the media defendants did not seek

out the Harmans or induce them to intercept the communications. The Harmans contacted WFAA with a story that was potentially newsworthy. Receiving, investigating, and reporting on tips from such sources is a routine news gathering technique. *See Pell v. Procunier*, 417 U.S. 817, 834 (1974) ("[A] journalist is free to seek out sources of information . . . and . .. government cannot restrain the publication of news emanating from such sources."). These types of activities are protected by the First Amendment. *Daily Mail*, 99 S. Ct. at 2671. Plaintiffs argue that the media should never be allowed to accept information obtained by a private party through an illegal wiretap. However, it is not incumbent upon the media to determine whether information provided by a source has been derived through legal means. This would create an undue burden and hardship on the media and impede its ability to disseminate newsworthy information in a timely fashion. As long as a media defendant does not personally intercept a protected communication or procedure another do so, any information acquired through legitimate newsgathering techniques is "lawfully obtained."[21]

b.

The next issue is whether the information involved a matter of public significance. Peavy was an elected member of the Dallas school board and appointed Oliver as the exclusive agent to obtain insurance on behalf of the district. The contents of the intercepted communications suggest an arrangement between Peavy and Oliver to split commissions on insurance policies sold to DISD. Clearly, this kickback scheme is a matter of great

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[21] Plaintiffs further argue that the information was not "lawfully obtained" because the media defendants used and disclosed the intercepted communications in violation of Title III. This misses the mark. The focus is on how the information was obtained, not what was done with it thereafter. *See Florida Star*, 109 S. Ct. at 2609, 2611; *Peavy*, 976 F. Supp. at 538.

public significance.

Plaintiffs argue that the contents of private telephone conversation scan never be a matter of public significance. At least one state court has suggested that a media defendant may be liable for publishing purely private information. *Natoli v. Sullivan*, 159 Misc. 2d 681, 606 N.Y.S.2d 504 (Sup. Ct. 1993), *aff'd*, 206 A.D.2d 841, 616 N.Y.S.2d 318 (App. Div. 1994). However, this begs the question presented here. The issue is whether the media can publish the contents of private communications that concern matters of public importance. *Natoli* provides little guidance on this issue. Indeed, the Supreme Court has admonished lower courts to decide each case on its own facts. *Florida Star*, 109 S. Ct. at 2609) ("We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case."). The facts of this case show that the information provided to the media defendants involved matters of public significance.

2.

The second question is whether the imposition of liability is necessary to further a state interest "of the highest order." *Id.* at 2611. Certainly, privacy is such an interest. *Id.* at 2609. However, the privacy interest asserted in this case is not the constitutional right of privacy--that is "the right to be let alone" from government intrusion into personal and intimate decisions and beliefs. *See generally Carey v. Population Services International*, 431 U.S. 678, 684-85 (1977) (citing cases). Rather, the privacy right implicated here arises under the federal and state wiretap laws.

While such statutory rights are certainly important, they fare poorly against the constitutional rights of a free and unfettered press. *See, e.g. Florida Star*, 109 S. Ct. at 2611 (privacy of victims of sexual offenses); *Daily Mail*, 99 S. Ct. at 2671

(anonymity of juvenile offenders). The privacy rights protected under Title III and the Texas Wiretap Act are no more compelling than those of rape victims or juvenile offenders. In fact, another judge in this district has found that the statutory right of privacy under Title III is not sufficiently compelling to warrant infringing on the constitutional right of the media to publish matter of public significance. *Peavy*, 976 F. Supp. at 539 (Buchmeyer, C.J.). This Court agrees with that conclusion. The imposition of liability on the media defendants is not necessary to protect a state interest of the "highest order."

3.

The third and final consideration is whether punishing the media defendants for publishing the information will result in "timidity and self-censorship." *Florida Star*, 109 S. Ct. at 2610. The answer in the context of this particular case is obvious. The Harmans provided the media defendants with tapes of intercepted telephone calls that contained evidence of possible corruption by Dan Peavy. The Court has already determined that these tapes were lawfully obtained by the media defendants and concerned matters of greater public interest. see part VI-A(1). Significantly, the tapes were not played over the air or referred to in broadcasts. The media defendants even attempted to determine whether the interceptions were legal. Their actions were consistent with those of a responsible journalist--to investigate leads, verify facts, and punish newsworthy information. To require anything more would undoubtedly result in "timidity and self-censorship." *See Florida Star*, 109 S. Ct. at 2610 (court should be reluctant to punish the use of routine newsgathering techniques).

The Court concludes that the First Amendment prohibits the imposition of liability against the media defendants under the use

and disclosure prongs of Title III and the Texas Wiretap Act.[22] Their motion for summary judgment should be granted on this ground.

B. Necessity

The Harmans claim that they were compelled by necessity to violate the law because Peavy threatened to harm them. "The defense of necessity, or choice of evils, traditionally covered situations where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils." *United States v. Bailey*, 444 U.S. 394, 410, 100 S. Ct. 624 (1980). In order to prove this defense, the Harmans must establish: (1) that they were under an unlawful and present, imminent, or impending threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury; (2) that they did not recklessly or negligently place themselves in a situation where they would be forced to chose the criminal conduct; (3) that they had no reasonable legal alternative to violating the law; and (4) a direct causal relationship between the criminal action taken and avoidance of the harm. *United States v. Willis*, 38 F.3d 170, 175 (5th Cir. 1994), *cert. denied*, 515 U.S. 1145 (1995).[23] These elements must be assessed under an objective rather than a subjective standard. *Id.*

The Harmans have failed to meet their burden of proof on at least two essential elements of this defense. The threats they overheard, although perhaps frightening, were not present, immediate, and impending. *See United States v. Stevens*, 985

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[22] This constitutional protection also extends to any internal uses or disclosures of the intercepted communications. The right to publish truthful information on matters of public significance would be meaningless if the media were not allowed to determine whether the information it seeks to publish is in fact truthful.

[23] *Willis* involved the defense of duress. However, the same elements are required to establish a necessity defense. *See Bailey*, 100 S. Ct. at 634.

F.2d 1175, 1182 (2d Cir. 1993) (generalized fear not tied to an immediate threat of harm des not implicate necessity defense); *United States v. Tanner*, 941 F.2d 574, 587 (7th Cir. 1991), *cert. denied*, 502 U.S. 1102 (1992) (fear alone is insufficient to establish defense of necessity). There is no indication that Peavy had a present or immediate intention to carry out any of the fanciful schemes he discussed with his neighbors. Moreover, the threats were not communicated directly to the Harmans or anyone in privity with them. *See United States v. Gordon*, 526 F.2d 406, 408 (9th Cir. 1975) (threats communicated by telephone do not satisfy immediacy requirement).

Nor have the Harmans established that they had no reasonable legal alternative to violating the law. The defense of necessity is reserved for cases of real emergency. *See United States v. Lewis*, 628 F.2d 1276, 1279 (10th Cir. 1980), *cert. denied*, 450 U.S. 924 (1981). It is not available unless "there is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory." *United States v. Boomer*, 571 F.2d 543, 545 (10th Cir.), *cert. denied*, 98 S. Ct. 2250 (1978). The evidence plainly shows that the Harmans had both the time and opportunity to contact the authorities. Their limited attempts to involve law enforcement officials do not prove that any further complaints would have been futile. Although the Harmans subjectively believed that law enforcement authorities were giving them the "run around," no reasonable person confronted with similar threats would have abandoned attempts to get the police involved after making a single report. *See United States v. Rawlings*, 299 U.S. App. D.C. 202, 982 F.2d 590, 593 (D.C. Cir. 1993) (defendant cannot claim defense if he passed up opportunity to se aid of law enforcement); *United States v. Laetividal-Gonzalez*, 939 F.2d 1455, 1465 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1280 (1992) (same). this defense fails as a matter of law.

C. Nexus to Interstate Commerce

The Harmans further contend that the intercepted communications involved telephone calls between local residents and therefore did not affect interstate commerce. This argument presumes that a nexus to interstate commerce is an essential element of a Title III claim. It is not. The elements of a violation are contained in 18 U.S.C. § 2511(1). In contrast, the nexus requirement is set forth in 18 U.S.C. § 2510(1). This section defines a "wire communication" as one made by "wire, cable, or other like connection . . . furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign commerce or communications affecting interstate or foreign commerce." *Id.* § 2510(1) (emphases added). Given its placement in the text of the statute, it seems more likely that the reference to interstate commence was merely an expression of Congress's power to regulate the matters covered by Title III.

Moreover, the federal wiretap statute also applies to communications carried by "facilities for the transmission of interstate or foreign commerce." *Id.* § 2510(1). The telephone is indisputably an instrumentality of interstate commerce. *See United States v. Clayton*, 108 F.3d 1114, 1117 (9th Cir.), *cert. denied*, 118 S. Ct. 233 (1997); *Kratz*, 477 F. Supp. at 475. As such, it is subject to federal regulation even when used purely for intrastate purposes. *See Dupuy v. Dupuy*, 511 F.2d 641, 643-44 (5th Cir. 1975) (intrastate use of telephone confers federal jurisdiction over private cause of action under Section 10 of the Securities and Exchange Act); *Aquionics Acceptance Corp. v. Kollar*, 503 F.2d 1225, 1228 (6th Cir. 1974) (same). This argument is without merit.

D. Prior Criminal Conviction

The Harmans also maintain that Title III requires proof of a

prior criminal conviction before civil liability attaches.[24] They base this theory on an overly generous reading of the statute. Section 2520(a) provides that "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used *in violation of this chapter* may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate." 18 U.S.C. § 2520(a) (emphasis supplied). This necessarily requires proof of a criminal violation. *See Kratz*, 477 F. Supp. at 483 ("No cause of action arises under Title III unless the criminal provisions of the statute have been violated."). However, civil liability is not predicted on proof of a criminal conviction. Indeed, Congress has rejected such an interpretation of Title III:

> The plaintiff may bring a civil action under section 2520 whether or not the defendant has been subject to a criminal prosecution for the acts complained of, but in the absence of such prosecution and conviction, it is the plaintiff's burden to establish that the requirements of the section are met.

1986 U.S.C.C.A.N. at 3581. This argument is without merit.

E. Texas Wiretap Act Defense

Finally, the Harmans contend that the Texas Wiretap Act does not apply to cordless telephones. They cite to a provision in the Texas Code of Criminal Procedure that applies to wiretap orders obtained by state law enforcement personnel. *See* TEX. CODE CRIM. PROC. ANN. art. 18.20 (Vernon Supp. 1997). The definition of "wire communications" under this statute specifically excludes the radio portion of cordless telephone

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[24] Charles Harman conveniently ignores the fact that he pled guilty to one count of unlawful interception and paid a $ 5,000 fine.

communications. *Id.* at § 1 (1). Therefore, the Harmans reason that their conduct is not actionable under the Texas Wiretap Act.

The Court has found no authority to support this novel argument. The Texas Wiretap Act broadly prohibits the interception, use or disclosure of any communication "transmitted in whole or in part with the aid of a wire or cable." TEX. CIV. PRAC. & REM. CODE ANN. § 123.001(1). Communications intercepted from cordless telephones are not excluded under the Act. The definitions contained in the civil statute control notwithstanding the provisions of the Texas Code of Criminal Procedure.

In sum, none of the defenses raised by the Harmans defeat plaintiffs' claims under Title III or the Texas Wiretap Act. Plaintiff's motion for summary judgment should be granted and the Harmans' motion should be denied.

VII.
COMMON LAW CLAIMS

Plaintiffs assert claims against all defendants for invasion of privacy, intentional infliction of emotional distress, and civil conspiracy. In addition, Eugene Oliver has sued the media defendants for riotous interference with contractual relations. The parties have filed cross-motions for summary judgment as to these common law claims.

A. Invasion of Privacy

Plaintiffs allege two distinct violations of their right to privacy. First, they maintain that all defendants intruded upon their seclusion, solitude, or private affairs. (Peavy WFAA Complaint ¶ 7; Peavy Harman Complaint ¶ 5; Oliver Complaint ¶ 7). Second, plaintiffs assert that the media defendants publicly disclosed embarrassing facts about them. (Peavy WFAA Complaint ¶ 6; Oliver Complaint ¶ 8). The Court will address each aspect of the privacy claims

separately.

1.

A plaintiff may recover for invasion of privacy by intrusion if he proves that: (1) the defendant intentionally intruded, physically or otherwise, upon his solitude, seclusion, private affairs, or concerns; and (2) the intrusion would be highly offensive to a reasonable person. RESTATEMENT (SECOND) of TORTS § 652B (1976); *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993). The intrusion element requires a positive act by the defendant, other than publication, that encroaches on the plaintiff's seclusion. *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 718-19 (4th Cir.), *cert. denied*, 501 U.S. 1212 (1991). A media defendant is not liable for merely receiving information that has been tortiously obtained by another, even if it has knowledge of the impropriety. *See McNally v. Pulitzer Publishing* Co., 532 F.2d 69, 79 n.14 (8th Cir.), *cert. denied*, 429 U.S. 855 (1976); *Pearson v. Dodd*, 133 U.S. App. D.C. 279, 410 F.2d 701, 705 (D.C. Cir.), *cert. denied,* 395 U.S. 947 (1969).

a.

The Harmans first contend that their intrusion was not "willful" because they relied in good faith on the advice of law enforcement officials. They cite several Texas cases for the proposition that an invasion of privacy must be "willful" or done with "conscious disregard for the rights of others." *See, e.g., Closs v. Goose Creek Consolidated Independent School District*, 874 S.W.2d 859, 870 (Tex. App.--Texarkana 1994, no writ). The terms "willful" and "intentional" are often used synonymously in tort law. *See Closs*, 874 S.W.2d at 871. Thus, plaintiffs need only prove that the Harmans desired the consequences of their actions or reasonably believed that such consequences were likely to result therefrom. See Part V-A(1). There is no question that the Harmans intended to intercept and tape plaintiffs' private

telephone conversations. Whether they believed their actions were legal is irrelevant.

The Harmans further argue that their conduct was not "unwarranted." They cite threats made by Peavy to remove them from the neighborhood and evidence of public corruption to justify their illegal wiretap activities. Although some courts have noted that an actionable intrusion must be "unwarranted," no reported decision has addressed this requirement in any detail. *See, e.g., Carr v. Mobile Video Tapes, Inc.*, 893 S.W.2d 613, 622 (Tex. App.--Corpus Christi 1994, no writ), citing *Billings v. Atkinson*, 489 S.W.2d 858, 859-60 (Tex. 1973) (invasion of privacy must be "substantial" and "unwarranted"). The Court therefore questions the legal significance of this aspect of an intrusion claim. Nevertheless, the summary judgment evidence establishes that the Harmans's actions were "unwarranted" as a matter of law. Petty disputes between neighbors do not justify the interception of private telephone calls. Nor does the revelation of an illegal insurance kickback scheme between Peavy and Oliver excuse this intrusion. Although the Harmans paint themselves as "concerned citizens," their actions were nothing short of vigilantism motivated by self-interest. The Court is unwilling to condone such conduct. Accordingly, the Harmans are not entitled to summary judgment on the intrusion claim.

Plaintiffs, on the other hand, are entitled to summary judgment against the Harmans. Eavesdropping is the quintessential example of a highly offensive intrusion upon seclusion. The tort is defined as "a physical invasion of a person' property or by eavesdropping on another's conversation with the aid of wiretaps, microphones, or paying." *Gill v. Snow*, 644 S.W.2d 222, 224 (Tex. App.--Fort Worth 1982, no writ) emphasis added); *see also Billings*, 489 S.W.2d at 860; RESTATEMENT (SECOND) OF TORTS § 652B, cmt. b. The Harmans listened to plaintiff's telephone conversations for several months with the aid of a police scanner. This constitutes intrusion as a matter of law.

b.

Plaintiffs contend that the media defendants are liable for intrusion because they encouraged the interceptions and accepted the fruits of this illegal activity. However, the Court has held that there is no evidence of active participation on the part of the media defendants. See Part V-B. Harman told Riggs that he planned to record future telephone calls and offered to provide him copies of the tapes. Riggs accepted the offer. He also asked Harmans to leave the recorder running throughout the entire conversation and not to edit the tapes so their authenticity could not be questioned. This benign suggestion does not amount to "a positive act by the [media] defendants . . . that encroaches on the plaintiffs' seclusion." *Reuber,* 925 F.2d at 718. The media defendants are entitled to summary judgment on the intrusion claim.

2.

Plaintiffs further allege that the media defendants publicly disclosed embarrassing facts about them. In order to prove this claim, plaintiffs must establish that: (1) the publicized information contains highly intimate or embarrassing facts about heir private affairs; (2) the publication of this information would be highly objectionable to a reasonable person; (3) the information was communicated to the public at large; and (4) the information was not a matter of legitimate concern to the public. *Johnson v. Sawyer*, 47 F.3d 716, 731 (5th Cir. 1995); *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

The corruption of a local school board official undoubtedly is a matter of legitimate public concern. *See Wallace v. Texas Tech University*, 80 F.3d 1042, 1050-51 (5th Cir. 1996); *Conaway v. Smith*, 853 F.2d 789, 796 (10th Cir. 1988). However, plaintiffs believe that information obtained in violation of the

federal wiretap statute necessarily negates any public interest. The Court disagrees. Title III and the tort of disclosure focus on different types of conduct. Title III broadly prohibits the dissemination of information obtained in violation of the wiretap laws regardless of content. Conversely, tort liability is predicated on the content of the disclosure regardless of how the information is obtained. *See McNally*, 532 F.2d at 79. Title III does not transform every violation of the statute into an actionable state law claim for public disclosure of private facts. *See Johnson*, 47 F.3d at 734-36 (rejecting argument that disclosure of information made confidential by tax laws is per se private, intimate, and embarrassing). "This requirement is necessarily one which can only be considered in the context of each particular case, considering the nature of the information and the public's legitimate interest in its disclosure." *Industrial Foundation*, 540 S.W.2d at 685. Clearly, the public had a right to know whether Peavy and Oliver agreed to split commissions on insurance policies sold to DISD. The Court concludes that the media defendants are entitled to summary judgment on this claim.

B. Intentional Infliction of Emotional Distress

Plaintiffs have sued all defendants for intentional infliction of emotional distress. (Peavy WFAA Complaint ¶ 8; Peavy Harman Complaint ¶ 7; Oliver Complaint ¶ 10). Texas law recognizes such a claim where: (1) defendants acted intentionally or recklessly; (2) their conduct was extreme and outrageous; and (3) plaintiffs suffered severe emotional distress as a result of that behavior. *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993); RESTATEMENT (SECOND) OF TORTS § 46 (1965). Defendants argue that plaintiffs cannot establish these elements. In addition, the media defendants contend that this claim is barred on constitutional grounds.

1.

Defendants first argue that their conduct was not "extreme or outrageous." This element is established "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.'" *Twyman*, 855 S.W.2d at 621, quoting RESTATEMENT (SECOND) OF TORTS § 46, cmt. d. Illegal wiretap activities may satisfy this requirement. *See Scutieri v. Estate of Revitz*, 683 F. Supp. 795, 802 (S.D. Fla. 1988). *But cf. Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 703 (7th Cir. 1993) (conduct of employer who monitored workplace phone calls not extreme and outrageous). However, the Court need not resolve this issue because none of the plaintiffs have established that their emotional distress was "severe."

Texas law requires a proof of emotional distress so severe that no reasonable person could be expected to endure it without experiencing unreasonable suffering. RESTATEMENT (SECOND) OF TORTS § 46, cmt. j; *American Medical International, Inc. v. Giurintano*, 821 S.W.2d 331, 341 (Tex.App.--Houston [14th Dist.] 1991, no writ). Plaintiffs must show more than "more worry, anxiety, vexation, embarrassment, or anger." *See Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995). The evidence adduced by plaintiffs fails to meet this standard. Anna Oliver testified that she cried a lot and experienced nightmares and insomnia. (Plf. Exh. P ¶ 2). Sally Peavy had nightmares, lost friends, and suffered from anxiety and embarrassment. (Plf. Exh. N ¶ 2). Eugene Oliver developed stomach cramps and headaches, and became worried and anxious when out in public. (Plf. Exh. O ¶ 2). Dan Peavy experienced headaches, depression, anxiety, and fatigue. (Plf. Exh. M ¶ 2). Both Oliver and Peavy claimed they had trouble sleeping and became short-tempered. (Plf. Exh. O ¶ 2; Plf. Exh. M ¶ 2). This does not constitute "severe emotional distress' as a matter of law. *See, e.g., McCray v. DPC Industries, Inc.*, 875 F. Supp. 384, 393

(E.D. Tex. 1995) (insomnia, anxiety, and fright); *Badgett v. Northwestern Resources Co.*, 818 F. Supp. 998, 1004 (W.D. Tex. 1993) (worry, negative attitude, intermittent headaches, and depression). *Cf. Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1141 (5th Cir. 1991) (emotional distress sufficiently severe where plaintiff became suicidal); *Motsenbocker v. Potts*, 863 S.W.2d 126, 135 (Tex. App.--Dallas 1993, no writ) same). It is also significant that plaintiffs were not required to seek help from a mental health professional. This further militates against a finding of "severe emotional distress." *See McCray*, 875 F. Supp. at 393; *Villasenor v. Villasenor*, 911 S.W.2d 411, 417 (Tex. App.--San Antonio 1995, no writ); *Benavides v. Moore*, 848 S.W.2d 190, 196 (Tex. App.--Corpus Christi 1992, writ denied). Defendants are entitled to summary judgment on this claim.

2.

The media defendants further contend that this claim is precluded by the First Amendment and *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S. Ct. 876 (1988). In *Falwell*, the Supreme Court held that public officials and public figures may not recover for intentional infliction of emotional distress by reason of publication "without showing in addition that the publication contains a false statement of fact which was made with 'actual malice' . . ." *Falwell*, 108 S. Ct. at 882. Dan Peavy was a public official by virtue of his position as an elected member of the Dallas school board. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) ("An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs.") Eugene Oliver became a public figure when he agreed to split commissions with Peavy on insurance policies sold to DISD.[25]

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[25] Sally Peavy and Anna Oliver are not public figures or public officials. However, their intentional infliction of emotional distress claims are based entirely on the publication of damaging information about heir husbands.

See Gertz, 94 S. Ct. at 3012. Plaintiffs concede that the information published about them was true.

Plaintiffs attempt to side-step these constitutional limitations by arguing that it was extreme and outrageous for the media defendants to investigate their activities based on the contents of illegally intercepted telephone calls. However, it is clear that any damages sustained by plaintiffs resulted from the publication of this information. *Falwell* precludes an intentional infliction of emotional distress claim against the media defendants.

C. Tortious Interference

Eugene Oliver alleges that the media defendants disparaged his name and reputation "privately and in a series of television broadcasts." (Oliver Complaint ¶ 14). As a result, Washington National Insurance Company stopped commission payments on disability income insurance policies sold to DISD and Mary Kay Cosmetics refused to consummate a contract for cancer insurance. Oliver has sued for riotous interference with contractual relations. (Oliver Complaint ¶¶ 12-14). The media defendants contend that this claim is barred by limitations.

A tortious interference claim based on disparaging or defamatory statements about a plaintiff is treated as a defamation action. *See KTRK Television v. Felder*, 950 S.W.2d 100, 108 (Tex. App.--Houston [14th Dist.] 1997, no writ). Such claims are governed by a one-year statute of limitations. *Laird v. Texaco, Inc.*, 722 S.W.2d 519, 521 (Tex. App--Beaumont 1986, no writ); *Moore & Associates v. Metropolitan Life Insurance Co.*, 604 S.W.2d 487, 491 (Tex. Civ. App.--Dallas 1980, no writ). The statute begins to run from the date the disparaging words are spoken or published. *Laird*, 722 S.W.2d at 521-22. The media defendants broadcast their report in July and August of 1995. However, Oliver did not file this lawsuit until December 30, 1996. His tortious interference claim is clearly barred by limitations.

D. Conspiracy

Plaintiffs allege that the defendants conspired to violate their rights under the federal wiretap statute and common law. (Peavy WFAA Complaint ¶ 7; Peavy Harman Complaint ¶ 6; Oliver Complaint ¶¶ 9, 15). A civil conspiracy is "a combination of two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995). An actionable conspiracy consists of: (1) two or more persons; (2) an objective to be accomplished; (3) a meeting of the minds of the objective; (4) one or more overt acts; and (5) damages as a proximate result of the conduct. *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983). Each participant in a conspiracy must have the specific intent to injure the plaintiff. *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 856 (Tex. 1968). Thus, the crux of a civil conspiracy is the harm intended rather than the agreement itself. *Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996). Merely proving a joint intent to engage in conduct that resulted in injury is not sufficient. *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996).

The Court initially observes that plaintiffs have failed to establish any of their claims against the media defendants. This does not necessarily preclude a conspiracy finding. A defendant is liable for conspiracy if he "participated" in an underlying tort for which the plaintiff seeks to hold at least one defendant liable. *Tompkins v. Cyr*, 995 F. Supp. 664, 685 (N.D. Tex. 1998); *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). "Participation" includes planning, assistance, or encouragement of another's unlawful acts. *Tompkins*, 995 F. Supp. at 685; *Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 926 (Tex. 1979).

Nevertheless, the Court finds no evidence of a civil conspiracy. Defendants honestly believed that their wiretap activities were lawful. They relied in good faith on the advice of law enforcement officials and legal counsel. If defendants did not

know their actions were illegal, they could not have any specific intent to "accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means." *See Juhl*, 936 S.W.2d at 644. One cannot conspire to commit a wrong about which he has no knowledge. *Schlumberger Well Surveying*, 435 S.W.2d at 857. Plaintiffs argue that reliance on the advice of others in irrelevant. While this maybe true in the context of their other claims, defendants' good faith belief that their conduct was legal is dispositive of the conspiracy allegations. Defendants are entitled to judgment as a matter of law on this claim.

E. Damages

Finally, the Harmans contend that plaintiffs have failed to prove damages as a result of their illegal wiretap activities and tortious conduct. This argument borders on frivolous. Plaintiffs are entitled to statutory and actual damages under both Title III and the Texas Wiretap Act.[26] *See* 18 U.S.C. § 2520(c)(2); TEX. CIV. PRAC. & REM CODE. ANN. § 123.004. In addition,

---

[26] Title II provides that "the court may assess as damages whichever is the greater of--

(a) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or
(b) statutory damages of whichever is the greater of $ 100 a day for each day of violation or $ 10,000."

18 U.S.C. § 2520(c)(2). The Texas Wiretap Act provides that "[a] person who establishes a cause of action under this chapter is entitled to . . .
(2) statutory damages of $ 1,000; [and]

(3) all actual damages in excess of $ 1,000. . . ."

TEX. CIV. PRAC. & REM. CODE ANN. § 123.004. Both Statutes also provide for injunctive relief, reasonable attorney's fees, and punitive damages is appropriate cases. 18 U.S.C. § 2520(b)(1)-(3); TEX. CIV. PRAC. & REM. CODE ANN. § 123.004(1), (4) & (5).

plaintiffs can recover any damages proximately caused by the invasion of their privacy. These damage issues should be deferred until trial. The Harmans are not entitled to summary judgment on this ground.

RECOMMENDATION

The cross-motions for summary judgment should be granted in part and denied in part. Plaintiffs are entitled to judgment as a matter of law on their claims against the Harmans for violations of Title II and the Texas Wiretap Act and for invasion of privacy by intrusion. All defendants are entitled to judgment as a matter of law on plaintiffs' common law claims for public disclosure of private facts, intentional infliction of emotional distress, tortious interference with contractual relations, and civil conspiracy. The media defendants are entitled to judgment as a matter of law on their affirmative defense that Title III and the Texas Wiretap Act are unconstitutional as applied to them.

All claims against the media defendants should be dismissed with prejudice. These cases should proceed to trial on the issue of damages and whether the Harmans intentionally disclosed the contents of the "Race Tape" in violation of Title II and the Texas Wiretap Act.

DATED: October 15, 1998.

JEFF KAPLAN
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

1. 18 U.S.C. § 2511 provides in relevant part:

(1) Except as otherwise specifically provided in this chapter [18 U.S.C. §§ 2510-20] any person who –

> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; [or]
>
> * * * *
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; [or]
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection . . .

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

2. The Texas Wiretap Act, Tex. Civ. Prac. & Rem. Code Ann. § 123.001, et seq. (Vernon 1986), provides in pertinent part:

> A party to a communication may sue a person who:
> (1) intercepts, attempts to intercept, or employs or obtains

another to intercept or attempt to intercept a communication; [or]

(2) uses or divulges information that he knows or reasonably should know was obtained by interception of the communication.

Id. § 123.002(a)(1)-(2).

(2)

Supreme Court, U.S.
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No. 00-691

IN THE

Supreme Court of the United States

WFAA-TV, INC. and ROBERT RIGGS,

Petitioners,

v.

CARVER DAN PEAVY and SALLY PEAVY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the First Amendment shields the press from a civil claim for violating the use and disclosure provisions of the federal and state wiretap laws with full knowledge of, encouragement of, and participation in the illegal interceptions.

2. Whether ignorance of the law excuses a civil violation of the use and disclosure provisions of the federal wiretap act.

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STATEMENT OF THE CASE

Dan and Sally Peavy filed this lawsuit to recover civil damages against a local television station, WFAA-TV, Inc. ("WFAA"), and one of its investigative reporters, Robert Riggs, for violations of the federal and state wiretap laws. WFAA and Riggs participated with the Peavys' neighbors to intercept and record the Peavys' private telephone conversations, which they then used and disclosed in the course of investigating a news story. The investigation culminated in a series of highly critical exposés on the local television news.

A. Statement of Relevant Facts.

In early December 1994, Charles and Wilma Harman began using a police scanner to purposefully intercept the cordless telephone calls of their neighbors, Dan and Sally Peavy. Pet. App. 2a. At that time, Dan Peavy was a trustee for the Dallas Independent School District ("DISD"). *Id.* The Harmans claimed that local law enforcement officials told them it was legal for them to intercept and record the Peavys' calls. *Id.* However, in a related case, the trial court found that no one told them their conduct was legal. *Id.* at 2a-3a; *Goodspeed v. Harman*, 39 F. Supp. 2d 787, 793-94 (N.D. Tex. 1999).

On December 8, 1994, Charles Harman called WFAA and told a producer that he had evidence of wrongdoing by Dan Peavy. Pet. App. 3a. Riggs called Harman back later that day, and Harman explained that he suspected Dan Peavy of public corruption. *Id.* At that time, Riggs had never heard of Dan Peavy and was not working on any story involving DISD insurance. *Id.*

The next day, Riggs went to the Harmans' home and saw exactly how the Harmans were intercepting the Peavys' calls.

Pet. App. 3a. The Harmans told Riggs they were intercepting the Peavys' cordless telephone calls with a scanner and discussed some of the conversations they had intercepted. *Id.* Riggs saw the scanner and listened to a tape of some of the intercepted calls. *Id.* Riggs knew the parties to the calls were not aware of, and did not consent to, the interception or recording. *Id.*

There was conflicting evidence about whether Harman told Riggs the interceptions were legal or Riggs told Harman they were legal. Pet. App. 3a. In any event, *no* law enforcement officials ever told Riggs, WFAA, or Harman it was legal. *Id.* at 2a-3a.

At the conclusion of the meeting on December 9, 1994, Riggs said he wanted any more tapes the Harmans made of the Peavys' calls in the future and instructed the Harmans how they should record the calls. Pet. App. 3a-4a, 16a, 17a. Specifically, Riggs told the Harmans not to turn the recorder off during the calls and not to edit the tapes. *Id.* at 3a-4a, 16a, 17a. The Harmans followed Riggs' instructions. *Id.* at 17a.

Riggs took the Harmans' tape of the Peavys' calls and returned to WFAA's offices to meet with the news director and other WFAA personnel. Pet. App. 4a. Riggs told them about his meeting with the Harmans and played parts of the tape for them. *Id.* Based on what they heard on the tape, they decided to launch an investigation of Dan Peavy and his activities involving insurance programs at DISD. *Id.* at 4a-5a. Riggs directed WFAA personnel to start researching the things they heard on the tape about Dan Peavy and the DISD. *Id.* at 4a.

The Harmans continued to intercept and record (consistent with Riggs' instructions) the Peavys' calls. Pet. App. 16a. Sometimes the Harmans would call Riggs to tell him they had another tape, and sometimes Riggs would call the Harmans to

ask if they had more tapes. *Id.* Riggs wanted more information from the Harmans to further his investigation of Peavy, and he asked them to keep him informed about anything else they heard on the Peavys' calls. *Id.* Whenever the Harmans had another tape, Riggs or his producer would go and pick it up. *Id.* Riggs had "a lot" of telephone conversations with the Harmans. *Id.*

Harman hated Peavy and wanted to "take him down." *Goodspeed*, 39 F. Supp. 2d at 792-93. Riggs encouraged the Harmans to keep intercepting the calls by assuring them he would look into the things on the tapes and telling them he was finding more "stuff" against the Peavys based on the tapes. Pet. App. 16a. Harman was "delighted" at the prospect of Riggs publicly humiliating Peavy. *Goodspeed*, 39 F. Supp. 2d at 792.

Over a period of approximately three months, WFAA and Riggs took eighteen tapes from the Harmans containing 188 conversations between the Peavys and others. Pet. App. 5a. WFAA and Riggs used and disclosed the contents of the tapes extensively in their investigation of Peavy and insurance issues at DISD. Pet. App. 4a-5a. WFAA personnel listened to every one of the tapes and had key conversations transcribed. *Id.* at 4a. They formulated story outlines, prepared memoranda, and conducted interviews and research, all based upon the contents of the tapes. *Id.* at 4a-5a.

In February 1995, law enforcement officials told Riggs it was illegal to intercept cordless telephone calls. Pet. App. 5a. Riggs checked with WFAA's outside attorney, Paul Watler, who confirmed that the interceptions were illegal. *Id.* However, Watler said WFAA and Riggs could use and disclose the contents of the tapes because the First Amendment would shield them from liability. *Id.* at 5a-6a.

Even after learning the interceptions were illegal, Riggs continued to talk to the Harmans to find out what they were hearing as they continued to intercept the Peavys' calls. Pet. App. 6a. WFAA and Riggs continued their investigation, notwithstanding the illegality of the tapes on which the whole thing was based. *Id.* They also kept at least one copy of the transcript they had made of key parts of the Peavys' conversations.[1] *Id.* Even after being told the tapes were illegal, Riggs nonetheless told federal law enforcement officials and a Dallas Police detective about the contents of the tapes and reported back to Harman on those discussions. *Id.* at 7a.

Beginning on July 31, 1995, WFAA broadcast several "exclusive" exposé news reports in which investigative reporter Riggs alleged serious wrongdoing by Dan Peavy in connection with DISD insurance programs. Pet. App. 6a-7a, 23a. Several months later, Dan Peavy was indicted on over forty counts of federal offenses related to his involvement with DISD insurance. *Id.* at 68a. He was later acquitted of all charges after a federal jury trial. *Id.*

B. The Petitioners' Factual Statements are Full of Irrelevant, Scandalous, and Erroneous Contentions.

The Petitioners spend most of their background statement (Pet. 3-7) trying to paint Dan Peavy as the villain. They spend page after page trying to poison the Court against the Peavys, accusing Dan of everything from corruption to racism to being

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1. The Petitioners' state "As soon as WFAA and Riggs learned that the interceptions were unlawful, they . . . transferred all copies of the tapes and related documents to their attorney for safekeeping." Pet. 15. That statement is wrong, as set forth in the Fifth Circuit opinion. Pet. App. 6a.

a bad neighbor.[2] Yet a few pages later, they say the specific details of the underlying facts are not relevant to the legal issues presented. Pet. 13.

It is important to remember that the District Court decided the case on summary judgment evidence only. Pet. App. 74a. Many of the District Court's findings were not supported by the evidence and/or were controverted by other evidence. The Peavys did not challenge all of the District Court's erroneous findings, because those findings were not relevant to the issues presented on appeal. Nor are they relevant to the issues presented in this case.

The thrust of the Petitioners' background statement is that Dan Peavy is such a bad person that his rights (and apparently those of his wife, Sally) are not worthy of protection. Even if what the Petitioners said were completely true, it would not somehow excuse their illegal activity. The wiretap laws protect everyone, even prisoners, against violations by anyone, even law enforcement officials. *Campiti v. Walonis*, 453 F. Supp. 819, 823 (D. Mass 1978), *aff'd*, 611 F.2d 387 (1st Cir. 1979).

Dan Peavy was investigated extensively by the FBI, the DISD's independent investigators, and the Petitioners themselves. Pet. App. 68a. He was indicted on over 40 counts, he was tried in a lengthy federal jury trial, and he was acquitted of all charges. *Id.*

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2. The Petitioners go so far as to quote part of an anonymously recorded telephone conversation that has absolutely nothing to do with the Petitioners or this case. Pet. 7. The District Court (which ruled against the Peavys) mentioned the tape but stated "A detailed recitation of these highly offensive remarks is neither necessary nor appropriate." Pet. App. 69a, n.5. The Fifth Circuit never even mentioned it. *See, generally*, Pet. App. 1a-60a. The Peavys object to inclusion of that conversation in the Petition on the ground that it violates S. Ct. Rule 26.4.

Throughout the Petition, the Petitioners complain that they should not be held liable because law enforcement officials and their attorney told them their conduct was legal. Pet. 16 ("advice they received from the government"), 17 ("advised of the lawfulness by local police, the district attorney, and [their] own attorney"), 18 ("authoritative legal advice"), 19 ("advice of law enforcement officials and legal counsel"). However, the *only* advice WFAA and Riggs ever received from law enforcement officials was that the interceptions were *illegal*. Pet. App. 5a. Although Harman claimed law enforcement officials and the district attorney's office told him the interceptions were legal, the trial court rejected that contention and found that *no one* ever told him it was legal. Pet. App. 2a-3a. WFAA's outside counsel *confirmed* that the interceptions were *illegal*, but he opined that the First Amendment would somehow shield WFAA and Riggs from liability. Pet. App. 5a-6a.

The Petitioners also refer to "authoritative legal advice" and "other information" that the interceptions were not unlawful. Pet. 18, 19. However, the *only* people who ever told WFAA and Riggs the interceptions were legal were Harman (who can hardly be considered authoritative) and and Watler (who acknowledged his error a short time later and confirmed that the interceptions violated the wiretap laws). Pet. App. 2a, 4a, 5a. The Petitioners fail to explain what "other information" made them think the interceptions were lawful.

REASONS FOR DENYING THE WRIT

A. The Petitioners' First Amendment Issue Does Not Merit Review by This Court.

The Petitioners make only one argument for granting their Petition on their First Amendment issue — they say this case presents the same constitutional question as *Bartnicki v. Vopper*,

Nos. 99-1687 and 99-1728, and ask the Court to hold the Petition in abeyance pending the decision in that case. Pet. 11, 12, 13, 15. The Petition should be denied on this issue for several reasons. First, this case is factually and legally distinguishable from *Bartnicki* in a constitutionally significant respect. Second, the Fifth Circuit's ruling on this issue does not conflict with any other federal court of appeals on any important matter. Third, the Fifth Circuit's opinion on this issue follows the settled precedents of this Court. Fourth, the Petitioners violated S. Ct. Rule 29.4(c) with respect to their constitutional challenge to the Texas statute.

1. This Case is Different from *Bartnicki* in a Constitutionally Significant Respect, and this Court's Ruling in *Bartnicki* Cannot Possibly Help the Petitioners.

The Petitioners overlook a critical distinction between this case and *Bartnicki* — their own knowledge of, encouragement of, and participation in the illegal interceptions. From the very first sentence and throughout the *Bartnicki* opinion, the Third Circuit emphasized the significance of the fact that the defendants had nothing to do with the interception. *Bartnicki v. Vopper*, 200 F.3d 109, 112, 113-114, 115, 119, 125, 128, 129 (3d Cir. 1999), *cert. granted*, 68 U.S.L.W. 3685 (U.S. June 25, 2000) (Nos. 99-1687, 99-1728). The court was very careful to point out the limited scope of the question it considered and the holding it reached:

> All that is at issue is the application of those [wiretap] statutes to punish members of the media *who neither encouraged nor participated directly or indirectly in the interception.*

* * *

> We therefore hold that the Wiretapping Acts fail the test of intermediate scrutiny and may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information *where there is no allegation that the defendants participated in or encouraged that interception.*

Id. at 128, 129 (emphasis added).

Likewise, *Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3686 (U.S. Apr. 25, 2000) (No. 99-1709), is a case in which the defendant had nothing to do with the illegal interception.[3] *Id.* at 465. Like *Bartnicki*, the *Boehner* court carefully limited the scope of its ruling to that specific context. *See id.* at 478 (Randolph, J.) (disclosure provisions of federal and state wiretap acts are "not unconstitutional as applied in this case"); *id.* at 478-79 (Ginsburg, J., concurring) (same).

In the case at bar, the Fifth Circuit recognized and respected that *Bartnicki* was limited to the situation where a defendant has nothing to do with the interception. Pet. App. 48a. The court repeatedly emphasized WFAA and Riggs' involvement in the interceptions[4] and distinguished *Bartnicki* on that basis alone,

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3. The Petitioners misstate the ruling in *Boehner* when they say it "raises questions of the role of the defendant in the interception of the telephone conversation at issue." Pet. 14. There was no allegation or finding in *Boehner* that the defendant had anything whatsoever to do with the illegal interception. *See, generally, Boehner*, 191 F.3d 463. The only question in *Boehner* about the conduct of the defendant was his participation in the illegal *disclosure* of the conversation when he accepted the tape from the individuals who intercepted it. *Id.* at 475-76, 479, 480.

4. Pet. App. 1a, 16a-17a, 32a, 33a, 34a, 35a, 49a, 50a, 53a, 57a.

explaining that the controlling facts of *Bartnicki* were "obviously, quite different from those here." *Id.* at 48a.

WFAA and Riggs' involvement with the interceptions is constitutionally significant for two reasons. First, it avoids any concern that the statutes might not be "narrowly tailored" to advance the government's interest in protecting the privacy of communications. The *only* speech or expression at issue is WFAA and Riggs' intentional use and disclosure of information they helped obtain through secret interceptions of many hundreds[5] of Dan and Sally Peavy's personal telephone calls. Second, it avoids any concern that applying the statutes to WFAA and Riggs in this case might somehow chill expression or lead to self-censorship. WFAA and Riggs knew *exactly* how the Harmans were intercepting and recording the Peavys' calls. Riggs saw the scanner, told the Harmans how to record, and encouraged them to keep doing it. Holding WFAA and Riggs liable in this case will not put any burden on the press to determine how their sources got their information or restrain publication of information from unknown or uncertain sources.

WFAA and Riggs cannot possibly be entitled to any greater First Amendment protection than the defendants in *Bartnicki*, who had no involvement whatsoever with the interception. However, WFAA and Riggs' involvement with the interceptions certainly could (and the Peavys respectfully submit *should*) give them less First Amendment protection than the *Bartnicki* defendants. If this Court reverses *Bartnicki* (holding the wiretap laws constitutional as applied), WFAA and Riggs cannot possibly expect to prevail on their First Amendment defense.

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5. WFAA and Riggs had 18 tapes of the Peavys' calls, which contained 188 separate conversations. However, only about ten percent of all intercepted conversations were taped. *Goodspeed*, 39 F. Supp. 2d at 789.

On the other hand, if the Court affirms *Bartnicki* (holding the wiretap laws *un*constitutional as applied), the involvement of WFAA and Riggs in the interceptions will keep them outside the protection of that case. Consequently, *Bartnicki* cannot possibly help WFAA and Riggs.

2. The Fifth Circuit's Ruling Does Not Conflict With Any Other Federal Court of Appeals on Any Important Matter.

All three federal courts of appeal that have considered a First Amendment challenge to the wiretap laws have adopted and applied the exact same standard — intermediate scrutiny. *Boehner*, 191 F.3d at 467; *Bartnicki*, 200 F.3d at 123; *Peavy*, Pet. App. 53a. The different results were dictated by applying that standard to the distinct facts of each case. In each case, the court emphasized that its holding was limited to the specific factual circumstances involved. *Boehner*, 191 F.3d at 478 (Randolph, J.), 478-79 (Ginsburg, J., concurring); *Bartnicki*, 200 F.3d at 117, 129; *Peavy*, Pet. App. 34a, 57a. If any of these three decisions is incorrect, it is due only to a misapplication of the intermediate scrutiny standard. A petition for writ of certiorari is "rarely granted" for that kind of error. S. Ct. Rule 10.

3. The Fifth Circuit's Ruling Follows the Settled Precedents of this Court.

The Fifth Circuit, like both of the other federal courts of appeal that have addressed the issue, followed the settled precedents of this Court to hold that the wiretap laws are subject to intermediate First Amendment scrutiny. Pet. App. 53a; *Boehner*, 191 F.3d at 467; *Bartnicki*, 200 F.3d at 123. Then the Fifth Circuit followed the settled precedents of this Court to

hold that the wiretap laws satisfy that standard as applied to the particular facts of this case. Pet. App. 57a-58a. Those rulings do not merit review by this Court.

a. The Wiretap Laws are Subject to Intermediate Scrutiny.

This Court has established two levels of First Amendment scrutiny for laws that have some impact on speech. Strict scrutiny applies to laws that (a) target or single out the press, *e.g.*, *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103-04 (1979), or (b) regulate speech based on content, *e.g.*, *Boos v. Barry*, 485 U.S. 312, 321 (1988). Otherwise, intermediate scrutiny applies. *E.g.*, *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). The wiretap laws at issue in this case do not fall within either category of laws that would trigger strict scrutiny.

The federal and Texas wiretap laws do not target or single out the press. They apply equally to all "persons." 18 U.S.C. § 2511(1); Tex. Civ. Prac. & Rem. Code § 123.002(a). They also prohibit all uses and disclosures, not just media publication. *Id.*; *cf. Daily Mail*, 443 U.S. at 98 (applied strict scrutiny to statute that prohibited certain information from being "published in any newspaper without a written order of the court"); *Florida Star v. B.J.F.*, 491 U.S. 524, 526 (1989) (applied strict scrutiny to statute that prohibited certain information from being disseminated "in any instrument of mass communication").

The federal and Texas wiretap laws do not regulate speech on the basis of content. Five federal courts of appeal have held that the federal wiretap act is content-neutral. *Peavy*, Pet. App. 53a; *Bartnicki*, 200 F.3d at 123; *Boehner*, 191 F.3d at 467-68; *see also*, *United States v. Underhill*, 813 F.2d 105, 110 (6th Cir.), *cert. denied*, 482 U.S. 906 (1987) (illegality is

not determined by the subject of the intercepted communication); *Watkins v. L.M. Berry & Co.*, 704 F.2d 577, 584 (11th Cir. 1983) (same). Although the Texas wiretap act uses different language that the federal act, the Texas act is likewise content-neutral. Tex. Civ. Prac. & Rem. Code § 123.002(a)(2).

Government regulation of expression is "content neutral" if it is justified without reference to the content of the regulated speech. *E.g.*, *Hill v. Colorado*, __ U.S. __, 120 S. Ct. 2480, 2491 (2000). The use and disclosure provisions of the wiretap laws are triggered not by the content of the communication, but rather by the conduct by which the information was obtained (*i.e.*, unlawful interceptions).[6] 18 U.S.C. § 2511(1); Tex. Civ. Prac. & Rem. Code § 123.002(a). The Petitioners would have been free to use and disclose the same content if they had gotten it without the aid of the illegally intercepted tapes. *Certain Interested Individuals v. Pulitzer Pub. Co.*, 895 F.2d 460, 467 (8th Cir.), *cert. denied*, 498 U.S. 880 (1990). The only significance of the content of the intercepted communication is to prove the existence of a violation and the amount of damages.[7]

6. The Fifth Circuit's ruling is perfectly consistent with this Court's precedents upholding content-neutral restrictions that are triggered solely by the source of the information sought to be disclosed or the method by which the information was acquired. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33-34 (1984) (information produced to a newspaper in civil discovery); *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670-71 (1991) (reporter obtained information by agreeing not to publish the source's name). Strict scrutiny is *not* appropriate for these kinds of restrictions. *Cohen*, 501 U.S. at 670-71; *Seattle Times*, 467 U.S. at 33-34; *cf.*, *e.g.*, *Florida Star*, 491 U.S. at 526 (applied strict scrutiny to statute that prohibited publishing the name of a victim, regardless of how the press obtained the name).

7. This Court has never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct. *Hill*, 120 S. Ct. at 2492.

The Petitioners are not entitled to any greater First Amendment protection just because they are members of the media. The media does not have any greater First Amendment protection of its speech than other persons. *Cohen*, 501 U.S. at 670; *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 150 (1967). Nor does the media enjoy any special right of access to information over other persons. *Branzburg*, 408 U.S. at 684; *Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 609 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 849-50 (1974). In the words of this Court:

> It would be frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news.

Branzburg, 408 U.S. at 691.

b. The Wiretap Laws Satisfy the Intermediate Scrutiny Standard on the Facts of this Case.

Under this Court's intermediate scrutiny standard, a regulation will be sustained if it furthers an important or substantial governmental interest, the governmental interest is unrelated to the suppression of free expression, and the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that governmental interest. *Turner*, 512 U.S. at 662; *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

The Constitution guarantees citizens a right of privacy in their communications. The First Amendment right of free speech includes a concomitant right of privacy *not* to speak publicly. *Harper & Row, Pub., Inc. v. Nation Enters.*, 471 U.S. 539, 559-60 (1985). The First Amendment freedom *not* to speak publicly serves the same ultimate end as the First Amendment freedom to affirmatively speak. *Id.* Likewise, the Fourth Amendment protects the right of "conversational privacy." *Pulitzer*, 895 F.2d at 464.

The government obviously has a substantial interest in protecting the constitutional right of privacy in communications. That interest is unrelated to the suppression of free expression; instead, it promotes free expression by assuring citizens that their private communications will remain private:

> [P]rotection of the privacy of communications is vital to our society. We depend upon the free interchange of ideas and information. And we are dedicated to the proposition that each individual should be free from unwarranted intrusion into his private affairs. Both these interests are threatened by modern techniques of electronic surveillance, however, since it is now possible to record surreptitiously the most intimate conversations and to preserve them for later disclosure.

United States v. Cianfrani, 573 F.2d 835, 856 (3d Cir. 1978).

The wiretap laws promote the government's interest in protecting the privacy of communications. In 1968, Congress found that "[t]he tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments,

privacy of communication is seriously jeopardized . . . ." S. Rep. No. 90-1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112, 2154. More specifically, Congress found as follows:

> Commercial and employer-labor espionage is becoming widespread. It is becoming increasingly difficult to conduct business meetings in private. Trade secrets are betrayed. Labor and management plans are revealed. No longer is it possible, in short, for each man to retreat into his home and be left alone.[8] Every spoken word relating to each man's personal, martial, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage.

Id. (footnote added).

In 1986, Congress found that the development of cellular telephones, computers, and other new means of electronic communication had made the problem even worse. "[T]remendous advances in telecommunications and computer technologies have carried with them comparable technological advances in surveillance devices and techniques," increasing the risk that communications "may be open to possible wrongful use and public disclosure by . . . unauthorized private parties." S. Rep. No. 99-541, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 3555, 3557.

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8. The "right to be let alone" has been characterized as "the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Congress responded to these privacy concerns by enacting the federal wiretap act, 18 U.S.C. § 2510, *et seq.*, which represents a "comprehensive scheme for the regulation of wiretapping and electronic surveillance." *Gelbard v. United States*, 408 U.S. 41, 46 (1972). In enacting those laws, Congress "intended to protect the privacy of the communication itself" and intended for the protection to be "comprehensive." 1968 U.S.C.C.A.N. at 2178.

In addition to the federal wiretap act, 45 states and the District of Columbia have enacted statutes that prohibit interception *and disclosure* of electronic communications. *See Boehner*, 191 F.3d at 468, n.6 (listing state statutes). That bolsters the congressional and judicial findings that the use and disclosure provisions of the wiretap laws effectively promote the government's interest in protecting the privacy of communications. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 834-35 (1978) (the fact that 47 states and the District of Columbia require judicial review commission proceedings to be kept confidential indciates that confidentiality promotes the government's interest in insuring the ultimate effectiveness of judicial review commissions).[9]

The use and disclosure provisions of the wiretap laws are essential to protect the privacy of communications: "Only by governing strictly both authorization [of interception] and disclosure of intercepted communications did Congress believe that such weighty interests could be protected adequately." *Cianfrani*, 573 F.2d at 855. From the outset, Congress recognized that prohibition of interception alone would not be enough to protect the privacy of communications. The identities

9. The Petitioner in *Landmark* did not challenge the statutory requirement of confidentiality. 435 U.S. at 836. Only two other states had provisions similar to the one this Court struck down on constitutional grounds in *Landmark*. *Id.*

of those involved in unlawful interception "[a]ll too often . . . will go unknown." 1968 U.S.C.C.A.N. at 2156. "Only by striking at all aspects of the problem can privacy be adequately protected." *Id.*

In particular, the use and disclosure provisions of the wiretap laws are essential parts of Congress' comprehensive scheme to protect the privacy of communications. It is important to keep in mind that the focus of the wiretap laws is on the privacy of the communication itself. 1968 U.S.C.C.A.N. at 2178. Prohibiting use and disclosure of illegally intercepted communications obviously helps preserve the privacy of the communication. As the Fifth Circuit recognized below, "the invasion of privacy that occurs with interception does not then end, but continues anew and spreads with each disclosure or other use of the interception." Pet. App. 57a. Although privacy interests are damaged when a private communication is intercepted, the damage is far greater when that communication is used and disclosed. *Id.* This case aptly demonstrates the need for prohibiting use and disclosure of illegally intercepted calls. The interception and recording destroyed the Peavys' privacy; the uses and disclosures destroyed their lives.

The D.C. Circuit succinctly explained the need to prohibit disclosure (and by implication, use) of illegally intercepted communications:

> Unless disclosure is prohibited, there will be an incentive for illegal interceptions; and unless disclosure is prohibited, the damage caused by an illegal interception will be compounded. It is not enough to prohibit disclosure only by those who conduct the unlawful eavesdropping. One would not expect them to reveal publicly the contents of the

> communication; if they did so they would risk incriminating themselves. It was therefore "essential" for Congress to impose upon third parties, that is, upon those not responsible for the interception, a duty of nondisclosure.

Boehner, 191 F.3d at 470. Without the use and disclosure prohibitions, criminals who illegally intercept calls could "launder intercepted information," and there would be almost no force to deter exposure of any intercepted secret. *Id.* The use and disclosure prohibitions effectively "dry up the market" for illegally intercepted communications, thereby removing a strong incentive for the interceptions. *Id.*

Some have argued that the government's interest in protecting the privacy of communications could be accomplished without the use and disclosure prohibitions, by instead focusing more on apprehending and punishing the interceptor. That argument fails for several reasons. First, the clandestine nature of interception will often make it impossible to find the interceptor. *See, e.g., Bartnicki*, 200 F.3d at 113, 115, 129 (tape left anonymously in mail box; identity of interceptor not known). Second, the government may choose, for whatever reason, not to prosecute the interceptor. In the case at bar, the Harmans were never prosecuted for the interceptions that WFAA and Riggs used and disclosed.[10] Third, the interceptor might not have sufficient assets available to satisfy a civil damage judgment in favor of the victim. Finally, and most importantly, wrongdoers (like WFAA and Riggs) would

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10. Charles Harman was prosecuted for a single interception he committed long after WFAA and Riggs had their 18 tapes. Pet. App. 6a. He pleaded guilty and was punished with a $5,000 fine. *Id.*

be able to shield themselves from liability simply by finding someone else (like the Harmans) to do their "dirty business."[11]

Any incidental restriction on First Amendment freedoms is no greater than is essential to further the governmental interest in protecting the privacy of communications. To satisfy this element of the intermediate scrutiny test, a statute need not be the least speech-restrictive means of advancing the government's interest. *Turner*, 512 U.S. at 662. All that is necessary is that the statute must promote a substantial government interest that would be achieved less effectively absent the regulation. *Id.* The statute will pass constitutional muster as long as it does not burden substantially more speech than is necessary to further the government's legitimate interests. *Id.*

Although the wiretap laws have some incidental effect on speech, as set forth above, they greatly promote the First Amendment right *not* to speak publicly and the Fourth Amendment right of conversational privacy. In the same way, for example, the copyright laws promote rather than offend constitutional values, even though they undeniably restrict some expression. *Harper & Row, Pub., Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

The use and disclosure provisions of the wiretap laws do not burden any more speech than is necessary to further the government's legitimate interests. By their terms, the wiretap laws are limited to intentional (*i.e.*, not accidental) use or disclosure by one who "know[s] or ha[s] reason to know that the information was obtained through the interception of a . . . communication in violation of this subsection." 18 U.S.C.

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11. *Gelbard v. United States*, 408 U.S. 41, 63 (1972) (Douglas, J., concurring) (referring to illegally intercepting telephone calls as "dirty business").

§ 2511(1)(c)(d). The Texas wiretap statute contains similar language. Tex. Civ. Prac. & Rem. Code § 123.002.

These provisions avoid any possibility of burdening more speech than necessary to protect the privacy of communications. The use and disclosure prohibitions do not apply to accidental uses or disclosures, and they do not apply unless the person knows or has reason to know how the information was obtained. Furthermore, the exact same information can be used and disclosed freely, as long as it did not come from an illegal interception. In the case at bar, the involvement of WFAA and Riggs in the interceptions absolutely negates any possibility that the wiretap laws, as applied in this case, will chill protected speech or lead to self-censorship. The only speech that is burdened by the wiretap laws as applied in this case is that which is essential to protect the privacy of telephone conversations.[12]

We are not faced here with a reporter who merely received a tip from a source, not knowing how the source got the information.[13] The wiretap laws do not impose or imply any

12. The question of whether the information is a matter of "public significance" is irrelevant to the constitutional analysis. First, the press would not use or disclose information that was not publicly significant in some respect. Second, creating an exception for information of public significance would discriminate on the basis of content, which could raise serious constitutional problems under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Hill*, 120 S. Ct. at 2492-93. Third, such an exception would ignore the plain language of the statute and create a judicial exception not contemplated by the legislature. Finally, such an exception would conflict with the suppression rule of 18 U.S.C. § 2515, which prohibits the contents of the illegally intercepted information from being admitted in any judicial proceeding.

13. Nor are we faced here with a person who overheard evidence of imminent violence and disclosed the information in (Cont'd)

duty on the media to determine how their sources got their information. But they do subject the media to liability in situations where (like here) a reporter knows for certain the information was obtained by intercepting private telephone calls and where he participated in and encouraged the interceptions.

4. The Petitioners Violated S. Ct. Rule 29.4(c).

The Petitioners squarely challenge the constitutionality of the use and disclosure provisions of the Texas wiretap statute. Pet. i; Pet. App. 112a. Neither the State of Texas nor any agency, officer, or employee thereof is a party to this case. Pet. ii. Those two facts trigger the notice and certification requirements of S. Ct. Rule 29.4(c). However, the Petitioners failed to comply with any of the provisions of that rule. The Peavys respectfully submit that the Court should deny the Petition with respect to the Texas wiretap act, because the Petitioners failed to notify the Texas Attorney General that a Texas statute is being challenged on constitutional grounds.

B. The Fifth Circuit Correctly Held That Ignorance or Mistake of Law is Not a Defense to Liability Under 18 U.S.C. § 2511(1)(c) and (d). No Review by this Court is Warranted.

It is axiomatic in American jurisprudence that ignorance of the law is no excuse and that all citizens are presumed to know the law. *E.g.*, *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411 (1833). The Petitioners, however, contend that the Fifth

(Cont'd)
an effort to prevent bodily harm. *Cf. Bartnicki*, 200 F.3d at 113 (local union president talked about blowing off the front porches of persons opposing pay raise). Although some narrow exception for necessity might allow a disclosure to law enforcement officials to prevent imminent violence, there is no possible exception that would allow the media to use and disclose the information for a news report several months after the interception.

Circuit erred in holding that ignorance of the law or mistake of law is not a defense to liability under the federal wiretap act. They contend that they lacked the requisite state of mind to violate the statute because they allegedly relied on the advice of law enforcement officials and their attorney to the effect that their conduct was legal. In support of their argument they grossly misstate the facts and reference inopposite case law.

1. Citizens Cannot Rely on Government Agents' Interpretations of the Law.

WFAA and Riggs contend *they* were advised by law enforcement officials that their conduct was legal. No such thing occurred. In fact, the only law enforcement officials *they* consulted told them it was *illegal*. Pet. App. 5a. Instead, it was Harman who told Riggs that he (Harman) had been told it was legal. Pet. App. 3a. WFAA and Riggs relied blindly on Harman. In actuality, however, Harman had never been told anything of the sort.[14]

In any event, it is irrelevant whether Harman had or had not been told by law enforcement officials that it was legal to intercept the Peavys' calls. *Reynolds v. Spears*, 93 F.3d 428, 436 (8th Cir. 1996) (reliance on law enforcement officer's erroneous advice did not absolve defendant of liability); *Penny v. Giuffridia*, 897 F.2d 1543, 1547 (10th Cir. 1990) (citizens are expected to know the law and may not rely on government agents' incorrect interpretations of the law).

The Model Penal Code, which the Petitioners cite as authoritative, confirms that citizens are *not* entitled to rely on law enforcement officials and government agents to interpret

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14. Pet. App. 2a-3a; *Goodspeed*, 39 F. Supp. 2d at 793-94 ("Harman was never told that his actions were legal.")

the law. As discussed in *Kratz v. Kratz*, 477 F. Supp. 463, 480 (E.D. Penn. 1979), the Model Penal Code states that in order for a *criminal* defendant to claim reasonable reliance on an *official* but erroneous statement of law, the *official* statement of the law must be contained in (1) a statute; (2) a judicial decision; (3) an administrative order; or (4) an *official* interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense. This is not a criminal case, and neither the alleged statements (which never occurred) nor the persons who allegedly made them (who never did) satisfy the standard proposed by the Petitioners.

The Petitioners try to sidestep this clear legal principle by posing a hypothetical about getting written advice from Attorney General Reno about the legality of their conduct. Pet. 18. But nothing like that ever happened in this case. Neither the Petitioners nor the Harmans ever requested or received any advice from Attorney General Reno or anyone in her office. No law enforcement officials or government agents ever told the Harmans their actions were legal. The only advice the Petitioners got from law enforcement officials or government agents was that their activities were *illegal*. Thus, the Petitioners' hypothetical is inapposite to the case at bar.

2. Erroneous Legal Advice is Not a Defense to Liability.

The Petitioners did, however, consult their attorney and initially he was wrong. For that they have a remedy. His erroneous advice, however, does not exculpate them from liability under the federal wiretap act. *Thompson v. Dulaney*, 838 F. Supp. 1535, 1542 (D. Utah 1993), *aff'd*, 970 F.2d 44 (10th Cir. 1992); *Kratz*, 477 F. Supp. at 466. Petitioners argue

that "there is every reason to think that [they] would have acted differently had they received accurate legal advice." Pet. 18. Such a statement is false. Their lawyer corrected himself a short time later and told the Petitioners their conduct was illegal. Undeterred, they nevertheless forged ahead taking comfort in what they considered to be their trump card — the First Amendment. They had a chance to act differently and they did not. They sought not to comply with the law but rather to find a way around it. Petitioners argue they acted responsibly once they heard their conduct was illegal. They did not. Acting responsibly would have required that they cease the investigation completely and move on to another story. With presumed *and* actual knowledge of the law, they chose to continue forward.

The Fifth Circuit, in rejecting the Petitioners' mistake of law defense, aligned itself with every other court that has considered the issue in the context of the federal wiretap laws. The Petitioners cannot cite a single case to the contrary because there are none. To the extent the Petitioners argue that there should be such a defense, that is a matter properly left to the legislature. The courts are justifiably reluctant to create exceptions where none exist, choosing instead to leave those matters properly to the legislature. *E.g.*, *Heggy v. Heggy*, 944 F.2d 1537, 1541-42 (10th Cir. 1991), *cert. denied*, 503 U.S. 951 (1992).

3. The Fifth Circuit Correctly Interpreted the Intent Requirement of the Federal Wiretap Act.

The element of intent under the federal wiretap act[15] means only that the act was done purposefully, rather than accidentally. *E.g.*, *United States v. Townsend*, 987 F. 2d 927, 930 (2d Cir.

15. The Petitioners have not challenged the Fifth Circuit's ruling with respect to the Texas wiretap act.

1993); *Forsyth v. Barr*, 19 F.3d 1527, 1534 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994). The focus of the "intentional" element is on the volitional nature of the act and not on the knowledge of the act's illegality. *E.g.*, *Thompson*, 838 F. Supp. at 1542. The Petitioners do not say their uses and disclosures were accidental.

The language of the statute does not support the Petitioners' mistake of law defense:

> Except as otherwise specifically provided in this chapter any person who . . . intentionally discloses [or uses] . . . the contents of any wire, oral, or electronic communication, knowing or having reason to know the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection. . . .

18 U.S.C. § 2511(1)(c, d). The words "wire, oral, or electronic communication in violation of this subsection" simply describe the kind of information that a person is prohibited from using or disclosing, *e.g.*, information from a telephone conversation intercepted without consent of at least one party to the call or a court order authorizing the interception. The federal wiretap act contains a lengthy description of interceptions that are prohibited, as well as a number of specific exceptions to those prohibitions. The use and disclosure provisions would be unintelligible if they had to repeat all of the terms defining the parameters of which interceptions are prohibited.

The words "knowing or having reason to know" do not imply any requirement that the offender subjectively know the terms of the federal wiretap laws. All they require is that the offender know the *underlying facts and circumstances* of the

interception that would bring the interception within the scope of interceptions prohibited by other parts of the statute. *Forsyth*, 19 F.3d at 1534. As with other laws, everyone is presumed to know the federal wiretap laws. *Id.*

This is not a criminal case, and the standards used in assessing criminal intent do not apply. As noted by the District Court, the federal wiretap act is a general intent statute even in the criminal context. Pet. App. 80a-81a. All of the cases cited by the Petitioners (other than *Kratz* and *Davis*) are criminal cases and involve specific intent crimes. They have no application to this case. *Kratz* involved a lawyer's reliance on a published judicial opinion. 477 F. Supp. at 483. *Davis v. Zirkelbach*, 149 F.3d 614 (5th Cir. 1998), did not involve any issue of intent, but rather involved a defense of official immunity and whether the law at issue was "clearly established" at the time of the official's conduct. *Id.* at 620. Neither *Kratz* nor *Davis* supports the Petitioners' mistake of law defense. *Kratz* expressly rejected that defense. 477 F. Supp. at 480.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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No. 00-691

In the Supreme Court of the United States

WFAA-TV, INC. AND ROBERT RIGGS, PETITIONERS

v.

CARVER DAN PEAVY AND SALLY PEAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

Section 2511(1)(c) and (d) of Title 18, United States Code, prohibits the intentional disclosure or use of the contents of an illegally intercepted wire, oral, or electronic communication by any person who "know[s] or ha[s] reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." The questions presented are:

1. Whether the application of 18 U.S.C. 2511(1)(c) and (d) to respondents violates the First Amendment.

2. Whether the *scienter* requirement of 18 U.S.C. 2511(1)(c) and (d) requires knowledge that federal law prohibited the interception of the communication in question.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 221 F.3d 158. The opinion of the district court (Pet. App. 61a-110a) is reported at 37 F. Supp. 2d 495.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2000. The petition for a writ of certiorari was filed on October 30, 2000, a Monday. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This is a private civil action arising under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), 18 U.S.C. 2510 *et seq.* Title III makes it generally unlawful to "intentionally intercept[], endeavor[] to intercept, or procure[] any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." 18 U.S.C. 2511(1)(a). In addition, Title III prohibits the intentional disclosure or use of the contents of illegally intercepted communications by persons who "know[] or hav[e] reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. 2511(1)(c) and (d).

Before 1994, Title III's definition of "wire communication" explicitly excluded communications transmitted by cordless telephones. See 18 U.S.C. 2510(1) (1988) (wire communication "does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit"). In 1994, however, Congress amended Title III to eliminate that exclusion. See Communications Assistance for Law Enforcement Act, Pub. L. No. 103-414, § 202(a)(1), 108 Stat. 4290. Since that time, Title III's prohibitions against the interception, disclosure, and use of private communications have applied with full force to conversations conducted using cordless telephones.

2. Beginning in December of 1994, Charles Harman used a police scanner to intercept the cordless telephone conversations of his neighbor, respondent Dan Peavy. At the time, Peavy was a trustee of the Dallas Independent School District. Using the scanner,

Harman overheard conversations suggesting, *inter alia*, that Peavy was engaged in financial wrongdoing in connection with his school position. Pet. App. 2a.

Harman allegedly contacted the Dallas County District Attorney's Office to ask whether it was lawful to monitor and record Peavy's cordless telephone conversations. By virtue of the then-recent amendment to Title III, the interception of those cordless telephone conversations was unlawful. Harman claims to have been told erroneously, however, that the law permitted such activity. Pet. App. 2a.

Harman then contacted petitioner WFAA-TV, Inc., and arranged to play portions of Peavy's recorded conversations to petitioner Robert Riggs, one of WFAA's reporters. Harman told Riggs that he planned to monitor and tape future telephone calls by Peavy, and he asked Riggs whether he wanted copies of the tapes. Riggs told Harman that he did. Riggs also told Harman to record Peavy's monitored conversations in their entirety, rather than suspend the taping during non-germane discussions, in order to ensure the authenticity of the tapes. Pet. App. 3a-4a.

Riggs and other employees of WFAA consulted the station's outside legal counsel, who erroneously told them that it was lawful for WFAA to use and broadcast the contents of the Peavy tapes. Harman eventually provided WFAA with 18 tapes containing 188 telephone conversations between Peavy and other persons. WFAA reviewed and transcribed the tapes and used the information contained in them to pursue an investigation into Peavy's activities. Pet. App. 4a-5a.

In late February of 1995, WFAA's outside counsel discovered for the first time that Title III applies to cordless telephone communications. The attorney notified WFAA, which returned the original tapes to

Harman and gave copies of the tapes and related documents to the attorney for safekeeping. Pet. App. 5a-6a.

In the summer of 1995, WFAA broadcast a three-part series by Riggs concerning Peavy's alleged financial misdeeds. The station did not play the tape recordings of Peavy's telephone conversations during the broadcasts. The broadcasts, however, included information that allegedly was derived from the tapes. Peavy resigned from his school position and was indicted, but ultimately acquitted, on charges of bribery, conspiracy, and tax evasion. Pet. App. 6a-7a.

3. In 1996, Peavy and his wife, respondent Sally Peavy, filed a civil action against petitioners in the United States District Court for the Northern District of Texas. Respondents asserted statutory claims under Title III and the Texas Wiretap Act as well as common law claims for invasion of privacy, intentional infliction of emotional distress, and conspiracy. Pet. App. 7a.

Respondents claimed that petitioners violated 18 U.S.C. 2511(1)(a) by "procur[ing]" Harman's interception of Peavy's cordless telephone conversations. Respondents also contended that petitioners violated 18 U.S.C. 2511(1)(c) and (d) by intentionally disclosing and using the contents of the intercepted conversations with knowledge that the information was obtained in violation of Title III. Respondents sought damages from petitioners under 18 U.S.C. 2520, which provides a private cause of action to any person whose communication has been intercepted, disclosed, or used in violation of 18 U.S.C. 2511.

The district court entered summary judgment in favor of petitioners. Pet. App. 61a-63a. With respect to respondents' procurement claim under 18 U.S.C. 2511(1)(a), the district court held that petitioners' dealings with the Harmans did not amount to "procuring"

the interception of respondents' conversations. Pet. App. 83a-86a. With respect to respondents' claims under 18 U.S.C. 2511(1)(c) and (d), the district court held that petitioners intentionally used and disclosed the contents of the illegally intercepted communications, and that petitioners' undisputed knowledge of the facts surrounding the interception satisfied the statute's *scienter* requirement. Pet. App. 82a-83a, 86a-90a. The court went on to hold, however, that the application of Section 2511(1)(c) and (d) to petitioners would violate the First Amendment. The court held that, as applied to the disclosure and use of truthful information about matters of public significance by persons who did not themselves conduct the illegal interception or procure others to do so, Section 2511(1)(c) and (d) is subject to strict scrutiny. The privacy interests served by the statute, the court concluded, are not weighty enough to satisfy strict scrutiny. Pet. App. 91a-96a.

4. The court of appeals affirmed in part, reversed in part, and vacated and remanded in part. Pet. App. 1a-60a. The court of appeals addressed three issues that are pertinent here.

First, the court of appeals vacated the district court's ruling that petitioners had not "procured" the Harmans' interception of respondents' conversations and remanded for further proceedings on that issue. Pet. App. 13a-17a. Based on its review of the summary judgment record, the court of appeals concluded that a reasonable jury could find that petitioners' conduct amounted to procurement. *Id.* at 17a. "At the very least," the court reasoned, "to the extent [that] Riggs' instructions regarding recording entire conversations caused the Harmans to intercept and record portions of conversations they otherwise would not have inter-

cepted and recorded, a reasonable jury could conclude [that] Riggs 'obtained' (or 'procured') the Harmans' interception of those discrete portions" of the conversations. *Ibid.*

Second, the court affirmed the district court's ruling that petitioners had the mental state or *scienter* required by the disclosure and use prohibitions in 18 U.S.C. 2511(1)(c) and (d). Pet. App. 29a-31a. Petitioners argued that, while they knew that the recordings were obtained through unconsented interception and monitoring of respondents' telephone conversations, they had a good-faith belief that those interceptions were lawful based on their consultations with their legal counsel and local law enforcement officials. *Id.* at 30a. The court of appeals held that a good-faith belief in the legality of the underlying interceptions is immaterial because Section 2511(1)(c) and (d) does not embody "an ignorance or mistake of law defense." *Ibid.* "Based on the existence of [Title III] and [petitioners'] knowledge of the circumstances of the Harmans' interception," the court concluded that petitioners had, "at a minimum, * * * reason to know the interceptions were illegal." *Id.* at 31a.

Third, the court of appeals reversed the district court's ruling that the application of Section 2511(1)(c) and (d) to petitioners violates the First Amendment. Pet. App. 32a-58a. The court held that Section 2511(1)(c) and (d) is subject to intermediate scrutiny, rather than strict scrutiny, and that "as applied to the facts in this case," the statutory prohibitions meet the requirements of intermediate scrutiny. *Id.* at 57a. In so holding, the court emphasized that petitioners had engaged in "undisputed participation concerning the interceptions," *id.* at 34a, making it "quite arguable that [petitioners] did not lawfully receive the contents of the

tapes," *id.* at 50a. The court ruled that petitioners' involvement in the interception distinguished this case from *Bartnicki* v. *Voppper*, 200 F.3d 109 (3d Cir. 1999), cert. granted, Nos. 99-1687, 99-1728 (argued Dec. 5, 2000). In *Bartnicki*, the Third Circuit held that the First Amendment bars the application of Section 2511(1)(c) and (d) to defendants who receive an unsolicited recording of an intercepted telephone conversation from an anonymous source and make the contents of the recording public. The Fifth Circuit noted that the decision in *Bartnicki* was directed at a case "*where[, unlike here,] there is no allegation that the defendants participated in or encouraged that interception.*" Pet. App. 48a (quoting *Bartnicki*, 200 F.3d at 129) (emphasis and bracketed language added by Fifth Circuit); see also *id.* at 53a ("the media defendants in *Bartnicki*, unlike [petitioners], were not in any way involved with the interceptors, or the interceptions").

DISCUSSION

1. Because the First Amendment issue presented by the petition in this case is related, although not identical, to the question currently pending before the Court in *Bartnicki* v. *Vopper*, No. 99-1687, and *United States* v. *Vopper*, No. 99-1728 (collectively *Bartnicki*), which were argued on December 5, 2000, we agree with petitioners (Pet. 11-15) that the case should be held for *Bartnicki*. In *Bartnicki*, the question presented is whether the imposition of civil liability under 18 U.S.C. 2511(1)(c) and (d) for using or disclosing the contents of illegally intercepted communications violates the First Amendment, where the defendant knows or has reason to know that the interception was unlawful but is not alleged to have participated in or encouraged it, and the

information at issue concerns a matter of public significance.

While the two cases have similarities, they differ in at least one potentially significant respect. In *Bartnicki*, the defendants disclosed the contents of an illegally intercepted conversation, but they were neither directly nor indirectly involved in the initial interception itself; the conversation was intercepted by an unknown party who anonymously mailed a tape of the conversation to one of the defendants. Here, in contrast, petitioners—particularly petitioner Riggs—were directly associated with ongoing interceptions. See Pet. App. 3a-5a, 16a-17a, 66a-68a, 84a-86a (summarizing Riggs's dealings with the Harmans). The precise extent of petitioners' involvement is unresolved, as is the precise effect of petitioners' actions on the Harmans' surveillance activities. Nonetheless, under any view of the record, petitioners are more closely associated with the interception in this case than were the defendants in *Bartnicki*. As a result, even if this Court were ultimately to hold that the First Amendment precludes the application of Section 2511(1)(c) and (d) to the defendants in *Bartnicki*, it would not necessarily follow that similar constitutional problems arise from application of the same provisions to persons in petitioners' position.

2. Petitioners also ask the Court to address the meaning of the *scienter* provision of 18 U.S.C. 2511(1)(c) and (d), which confines liability for the disclosure or use of illegally intercepted communications to persons who "know[] or hav[e] reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." The Fifth Circuit held that the *scienter* requirement does not require actual knowledge of the

legal requirements of Title III itself. That holding is correct and does not conflict with any decision of this Court or any court of appeals. Accordingly, further review is not warranted.

Every court of appeals that has addressed the *scienter* requirement in Section 2511(1)(c) and (d) has reached the same conclusion—that it requires only knowledge of the facts that render the interception unlawful, not knowledge of the legal standards that apply to the interception. See *Forsyth* v. *Barr*, 19 F.3d 1527, 1538 n.21 (5th Cir.), cert. denied, 513 U.S. 871 (1994); *Williams* v. *Poulos*, 11 F.3d 271, 284 (1st Cir. 1993); *United States* v. *Wuliger*, 981 F.2d 1497, 1502 (6th Cir. 1992), cert. denied, 510 U.S. 1191 (1994); *Thompson* v. *Dulaney*, 970 F.2d 744, 749 (10th Cir. 1992). See also *Reynolds* v. *Spears*, 93 F.3d 428, 435-436 (8th Cir. 1996) (reliance on advice of law enforcement officer is not a defense to liability under Section 2511(1)(a)); *Heggy* v. *Heggy*, 944 F.2d 1537, 1541-1542 (10th Cir. 1991) (good-faith belief in legality of conduct is not a defense to liability under Section 2511(1)(a)), cert. denied, 503 U.S. 951 (1992); *United States* v. *McIntyre*, 582 F.2d 1221, 1224-1225 (9th Cir. 1978) (same). Although petitioners cite a number of supposedly contrary decisions of this Court and other courts of appeals (Pet. 20-22), none of those decisions involves the statutory provisions at issue here, and none involves the language used in Section 2511(1)(c) and (d).

Moreover, in arguing that "reasonabl[e] reli[ance] on advice from law enforcement authorities, legal counsel, or similarly authoritative sources of information" negates liability under Section 2511(1)(c) and (d), Pet. 17, petitioners disregard the existence of 18 U.S.C. 2520(d), which creates an express and carefully defined good-

faith defense to liability under Title III. Section 2520(d) provides that:

> A good faith reliance on—
>
> (1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;
>
> (2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or
>
> (3) a good faith determination that section 2511(3) of this title permitted the conduct complained of;
>
> is a complete defense against any civil or criminal action brought under this chapter or any other law.

Section 2520(d) represents a conscious effort by Congress to identify the circumstances in which a good-faith belief in the legality of conduct excuses a defendant from liability under Title III.

Petitioners do not claim that this case comes within the ambit of Section 2520(d). Nor could they: Section 2520 does not recognize a good-faith exception for reasonable reliance "on advice from law enforcement authorities, legal counsel, or similarly authoritative sources of information" (Pet. 17). Petitioners thus, in essence, are inviting the judiciary to create an additional good-faith exception beyond those that Congress itself chose to recognize. The courts of appeals have uniformly and correctly rejected that invitation, and there is no reason for this Court to do otherwise here.*

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* Indeed, it is far from clear that this case properly presents any question concerning Title III's applicability to parties who rely

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be held pending this Court's decision in *Bartnicki* v. *Vopper*, No. 99-1687, and *United States* v. *Vopper*, No. 99-1728, and then disposed of as is appropriate in light of the decision in those cases.

"on advice from law enforcement authorities, legal counsel, or similarly authoritative sources of information" (Pet. 17). Although petitioners claim that they should be able to avoid liability because they did not know that the interceptions were prohibited by Title III, they do not dispute that, in late February of 1995, their outside counsel discovered that Title III applies to cordless telephone communications and expressly notified petitioners that the communications at issue here were illegally intercepted. Petitioners, in fact, responded by returning the original tapes to Harman and giving copies of the tapes and related documents to their attorney for safekeeping. Pet. App. 5a-6a. Nonetheless, in the summer of 1995, petitioners allegedly used and disclosed information obtained from the illegally intercepted communications in the preparation and broadcast of a three-part series concerning respondent Peavy's alleged financial misdeeds. *Id.* at 6a-7a; see *id.* at 88a ("Ultimately, the tapes formed the basis for the broadcasts themselves."); *id.* at 89a (the broadcasts "disclosed the 'substance, purport, and meaning' of the illegally intercepted communications" even though they "did not play, refer to, or summarize the tapes"). See also *id.* at 23a (remanding because "there is a material fact issue whether, in their television broadcasts, defendants intentionally disclosed the contents of the illegal interceptions."). It is difficult to see how petitioners can defend in this action by claiming ignorance of the law when they persisted in their offending conduct—knowing use and disclosure of information from communications intercepted in violation of Title III—months *after* their outside counsel specifically advised them that the initial interceptions in fact were illegal.

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REPLY BRIEF FOR PETITIONERS

1. The United States agrees with petitioners WFAA and Riggs that, with respect to the first question presented – whether the imposition of civil liability on a media defendant under 18 U.S.C. § 2511(1)(c) and (d), and a parallel Texas state wiretap statute, for using or disclosing the contents of illegally intercepted communications violates the First Amendment – this Court should hold this petition in abeyance pending the disposition of *Bartnicki* v. *Vopper*, No. 99-1687, and *United States* v. *Vopper*, No. 99-1728, *cert. granted*, 120 S. Ct. 2716 (June 26, 2000) (oral argument Dec. 5, 2000).

The United States contends that this case differs from Nos. 99-1687 and 99-1728 because here petitioners supposedly "were directly associated with ongoing interceptions," although "[t]he precise extent of petitioners' involvement is unresolved, as is the precise effect of petitioners' actions on the Harmans' surveillance activities." Govt. Opp. Cert. at 8. Notably, the United States does not suggest that these factual issues are a reason to deny the petition. Nor could the United States persuasively advance such a suggestion, in light of the Fifth Circuit's holding that none of those factual issues prevented it from addressing the First Amendment question on the merits. Pet. App. 33a. By the same token, this Court will also be able to reach the constitutional issue in this case based on the record below.

Even if the factual issues identified by the Fifth Circuit were relevant to the ultimate merits of this case, a "hold" would still be appropriate so that this Court's decision in *Bartnicki* articulating the governing First Amendment standard can be properly applied in this case to WFAA and Riggs, after whatever additional factfinding was warranted. By comparison, the United States has asked this Court to hold the petition in *McDermott* v. *Boehner*, No. 99-1709, even though that case also raises questions about the role of the defendant in the alleged wrongdoing. See *Boehner* v. *McDermott*, 191 F.3d 463, 476 (D.C. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3686 (U.S. Apr. 25, 2000) ("By accepting the tape from the Martins,

McDermott participated in their illegal conduct."); *Bartnicki* v. *Vopper*, 200 F.3d 109, 128 (CA3 1999) ("McDermott was more than merely an innocent conduit."). The private respondents are simply incorrect when they assert that the defendant in *Boehner* "had nothing to do with the illegal interception." Peavy Opp. Cert. at 8.

It should be immaterial whether WFAA and Riggs are deemed to be involved in some capacity in the interception, for the proper First Amendment analysis must not be allowed to turn on whether the media defendant was on notice of, or have participated in, the underlying illegal interception. Any person who intercepts a wire or electronic communication, or procures another person to do so, is subject to punishment under Section 2511(1)(a), 18 U.S.C. § 2511(1)(a). The availability of separate sanctions under that section for the act of interception provides *less* reason, not *more*, to punish communicative activities protected under the First Amendment. While media defendants may be punished for their role in the interception, they should never be punished for exercising their First Amendment rights.

In both *Landmark Communications* v. *Virginia*, 435 U.S. 829 (1978), and *Florida Star* v. *B.J.F.*, 491 U.S. 524 (1989), for example, the media defendant could have been deemed a "participant" in the underlying wrongdoing, yet this Court held in each case that the media defendant was protected by the First Amendment. In *Landmark*, this Court held that Virginia could not punish a newspaper that had breached the confidentiality of proceedings before a commission on judicial misconduct, even though the newspaper was aware of a Virginia statute prohibiting publication of information that had been provided by a third party in violation of state law. 435 U.S. at 830 n.1, 832. In *Florida Star*, this Court reversed the imposition of civil damages liability against a newspaper that published a rape victim's name in violation of a state statute. The name had been disclosed, in violation of state law, by a Sheriff's Department employee. 491 U.S. at 527, 536. The newspaper was aware, as evidenced by signs posted in the newsroom, that "the names of rape victims

were not matters of public record, and were not to be published." *Id.* at 546 (White, J., dissenting). Nonetheless, this Court warned that the press could not be expected to shoulder "the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication." *Id.* at 536.

Therefore, the factual issues identified by the Fifth Circuit would not be relevant to the proper application of First Amendment principles, even if those factual issues were resolved adversely to petitioners.

2. The private respondents advance a number of merits arguments in defense of the statutes at issue in this case. Peavy Opp. Cert. at 10-21. None of these is a reason to deny certiorari. Moreover, none has merit. This case should be decided according to a simple, bright line rule: if a journalist breaks the law to obtain information, she is subject to whatever generally applicable legal penalties may be triggered by the act of misappropriation. However the journalist has obtained information, she may be punished only for any impropriety in obtaining it, and not for the separate decision to publish it, absent a countervailing governmental interest of the highest order.

This Court has held that, where the press manages to obtain otherwise confidential information, it cannot be prevented from publishing it – or be punished for having done so. See *Florida Star* v. *B.J.F.*, 491 U.S. 524, 536 (1989); *Smith* v. *Daily Mail*, 443 U.S. 97, 101-02 (1979); *Landmark Communications* v. *Virginia*, 435 U.S. 829, 837 (1978). This rule does not depend on whether the statute invoked to prevent or punish publication is content-based or content-neutral. Rather than focusing on content discrimination, this Court has emphasized the need to resolve in favor of speech the conflict between truthful reporting and government-protected privacy interests. See, *e.g.*, *Florida Star*, 491 U.S. at 530.

Nor is intermediate rather than strict scrutiny appropriate, despite what the private respondents contend. Peavy Opp. Cert.

13. In *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), this Court expressly found inapplicable the intermediate scrutiny of *United States* v. *O'Brien*, 391 U.S. 367, 376-77 (1968): "The Georgia cause of action for invasion of privacy through public disclosure of the name of a rape victim imposes sanctions on pure expression – the content of a publication – and not conduct or a combination of speech and nonspeech elements that might otherwise be open to regulation or prohibition." 420 U.S. at 695.

Even if the rule of *Florida Star* did not apply here, Section 2511(1)(c) and Section 2511(1)(d) would be subject to strict scrutiny under conventional First Amendment doctrine because they are, in any event, content-based prohibitions on speech. Although the matter was not highlighted during oral argument in *Bartnicki* on Dec. 5, 2000, they do not in fact operate in a mechanical fashion as a straightforward ban on the verbatim broadcast of tapes of intercepted communications. Instead, Title III requires a court to examine the communicative substance of what a defendant says in order to determine whether it "uses" or "discloses" "the contents of" an illegal interception. For example, in this case the Fifth Circuit held that petitioners could be held liable under Title III even though WFAA did not play or even mention any intercepted tapes in the television broadcasts. Pet. App. 23a-24a.

In an analogous way, the New York "Son of Sam" law at issue in *Simon & Schuster, Inc.* v. *Members of New York Crime Victims Bd.*, 502 U.S. 105 (1991), was content-based because it was "directed only at works with a specified content," *id.* at 116 – namely, those manifesting a defendant's "thoughts, feelings, opinions or emotions regarding [his] crime." *Id.* at 109. Just as the New York statute required a court to dissect the content of a book or movie in order to determine whether it expressed a defendant's knowledge about his past misdeeds, Title III requires a court to examine the communicative substance of a broadcast or publication to determine whether it "uses" or "discloses" "the contents of" a past misdeed (the fruits of an intercepted communication). Indeed, Title III is more objectionable, in First

Amendment terms, than the "Son of Sam" law. Title III does not merely prohibit a person who knows of an illegal interception from pocketing the proceeds of that crime; Title III flatly prohibits the person from "using" or "disclosing" the *informational* "contents" (18 U.S.C. § 2511(1)(c), (d)) flowing from the interception.

Moreover, Title III's purpose is likewise inextricably linked to the content of the speech proscribed. Title III is avowedly aimed at preventing the psychic harm associated with the disclosure of improperly obtained private facts that a telecommunications user wishes to shield from public view. Far from supporting the law, the interests purportedly served by Section 2511(1)(c) and Section 2511(1)(d) reveal the inevitably content-based nature of the statute. These interests stem from the communicative impact of speech and nothing but that impact – what information it expresses and how the audience would understand it. Yet this Court has instructed that "reaction to speech is not a content-neutral basis for regulation." *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 134 (1992); see also *City of Erie* v. *Pap's A.M.*, 120 S. Ct. 1382, 1391 (2000) (plurality opinion) ("If the government interest is related to the content of expression, . . . then the regulation falls outside the scope of the *O'Brien* test.").

Even if intermediate scrutiny were to apply, the government could not meet its burden of justifying Section 2511(1)(c) and Section 2511(1)(d). The interception itself is already separately prohibited in Section 2511(1)(a). The use and disclosure provisions are gratuitous restrictions on speech, and speech alone, penalizing pure expression while providing no clear assurance that they serve any important governmental interest – much less any assurance that they are narrowly tailored means of achieving that interest.

The private respondents speculate that the use and disclosure prohibitions are needed to "dry up the market" for illegally intercepted communications. Peavy Opp. Cert. at 18. Conceivably so. But this Court has repeatedly held that, even

under merely intermediate scrutiny, restrictions on speech cannot be justified by such unadorned conjecture, even if labeled "common sense."[1] It seems equally plausible to assume that few if any eavesdroppers are motivated chiefly by the prospect of delivering the intercepted information to the press. Rather, like Mr. Harman in this case, they are motivated by other considerations and will not alter their behavior as a result of Section 2511(1)(c) and Section 2511(1)(d). It is undisputed that Harman began taping *before* he even approached WFAA-TV, and he continued to tape even *after* WFAA-TV informed him that it would not accept any additional tapes. The only evidence the private respondents are able to muster is hopelessly out-of-date and relates to the technological state of the art in 1968 and 1986. Peavy Opp. Cert. at 14-17. This evidence fails to consider (to take obvious examples) advances in encryption, public key infrastructure, digital phones, and other technological means of protecting privacy short of a total ban on speech.[2]

3. The private respondents contend that petitioners should

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[1] See also *Greater New Orleans Broadcasting Council* v. *United States*, 527 U.S. 173, 188 (1999) (quoting *Edenfield* v. *Fane*, 507 U.S. 761, 770-71 (1993)); *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 505 (1996) (plurality opinion); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 487 (1995); *Ibanez* v. *Florida Dept. of Business & Professional Reg.*, 512 U.S. 136, 143 (1994).

[2] See, *e.g.*, *Hard of Hearing*, NEWSWEEK, Dec. 13, 1999, p. 78 ("Digital transmissions, used for most mobile phones and soon for almost all telecommunications, are harder to intercept than the old analog signals. Whereas analog signals are transmitted in a continuous stream, digital signals are broken into small, hard-to-track packets. E-mail and telephone calls that use the Internet are almost impossible to intercept. While digital packets can be snatched in bulk, reassembling them is very difficult. The sheer volume of global information makes it hard to sort out key words and phrases. Encryption, once rare in everyday commerce and communication, has been made commonplace by software programs that anyone . . . can get. . . . New technology poses obstacles to eavesdropping that may be virtually insuperable.").

have notified the Texas Attorney General that the constitutionality of the Texas wiretap statute has been called into question, under Supreme Court Rule 29.4(c). Peavy Opp. Cert. at 21. Yet the Texas Attorney General is well aware of the petition in this case and has appeared in this Court on behalf of the State of Texas. In fact, respondents fail to note that on November 27, 2000, the Office of the Texas Attorney General informed the Clerk of this Court by letter that the Attorney General waives any response to the petition for writ of certiorari in this matter. It is therefore entirely unjustified for the private respondents to purport to assert the prerogatives of the Texas Attorney General, when he himself has waived any right to respond.

4. Regardless of the outcome of Nos. 99-1687 and 99-1728, this Court should grant plenary review on the second question presented: whether the imposition of liability under 18 U.S.C. § 2511(1)(c) and (d) requires a showing that the defendant "know[s] or ha[s] reason to know that the information was obtained . . . in violation of this subsection." The issue is not, as the private respondents mistakenly contend, an abstract "ignorance of the law" or a "mistake of law" defense. Peavy Opp. Cert. at 21-24. Rather, the question is whether the scienter requirement in the statute allows the defendant to exculpate himself by showing, on the basis of advice from law enforcement authorities, legal counsel, or similarly authoritative sources of information, that he was not aware of the Title III prohibition. By any common sense understanding, a defendant like WFAA or Riggs who has been advised of the lawfulness of his conduct has no "reason to know" that the conduct violates Title III. This defense is built into the scienter requirement itself and does not duplicate the entirely separate affirmative defense of 18 U.S.C. § 2520(d), which accords immunity to otherwise illegal interceptions involving court orders, grand jury subpoenas, requests of law enforcement officers, or good faith determinations of telecommunications service providers.

Our construction of the scienter requirement is more faithful to the statutory language enacted by Congress because it gives meaning to the decision to place the phrase "in violation of this subsection" after the verb "know[s] or ha[s] reason to know[]." By contrast, the Fifth Circuit's interpretation draws an arbitrary line between the defendant's knowledge of underlying facts relevant to lawfulness (regarding which a defendant may put on evidence) and the defendants' actual and reasonable understanding of the legal standard established by Section 2511(1)(c) and Section 2511(1)(d) (regarding which a defendant may not offer proof, according to the Fifth Circuit). Yet the statute does not differentiate between knowledge of underlying facts relevant to lawfulness and knowledge of the governing legal standard.

The Fifth Circuit's reasoning is inconsistent with the approach taken by this Court in analogous situations. See, *e.g.*, *Liparota* v. *United States*, 471 U.S. 419, 425 (1985) (federal statute relating to food stamp fraud (7 U.S.C. § 2024(b)) required proof that the defendant knew his conduct to be unauthorized by the applicable statute or regulations); *United States* v. *Murdock*, 290 U.S. 389, 396 (1933) ("Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct.").

The principal drafter of Title III, Professor G. Robert Blakey, indicated that "good faith mistakes under the statute will not be subject to criminal sanctions. This seems only just in light of the technical character of the Act." G. R. Blakey and J. A. Hancock, *A Proposed Electronic Surveillance Control Act*, 43 NOTRE DAME LAWYER 657, 666 n. 19 (1968) (citing *Murdock*).

Further, the Fifth Circuit's interpretation is intrinsically unreasonable. It would permit liability to be imposed even if the defendant has been assured in writing by the Attorney General herself that the interception in question is entirely lawful under

Section 2511. Cf. *Raley* v. *Ohio*, 360 U.S. 423, 438 (1959); *Lambert* v. *California*, 355 U.S. 225, 227 (1957). The due process principles that such near-entrapment jeopardizes are underscored by the First Amendment rights at stake. If the press cannot rely on authoritative legal advice to confirm the permissibility of traditional methods of newsgathering, there will be an unacceptable risk of chill, timidity, and self-censorship.

At the very least, the statutory language is unclear, and plenary review by this Court is warranted to resolve the ambiguity regarding an important question of federal law. It would be particularly appropriate to grant certiorari to define the contours of the scienter requirement because in *Bartnicki* v. *Vopper*, No. 99-1687, and *United States* v. *Vopper*, No. 99-1728 the government has raised the scienter issue as a means of defending Title III under the First Amendment. Brief of the United States at 45-46.

The Government claims that there is no disagreement in the lower courts over the scienter issue. That is an oversimplification, as even the cases cited by the Government demonstrate. For example, in *United States* v. *Wuliger*, 981 F.2d 1497 (CA6 1992), *cert. denied*, 510 U.S. 1191 (1994) (cited in Govt. Opp. Cert. at 9), the Sixth Circuit, citing *Liparota*, *reversed* the defendant's conviction because "[u]nder section 2511(1)(d), the government must prove beyond a reasonable doubt that the defendant knew or had reason to know that the recordings he used were obtained in violation of the Act." *Id.* at 1509. In *Williams* v. *Poulos*, 11 F.3d 271, 284 (CA1 1993), and *Thompson* v. *Dulaney*, 970 F.2d 744, 749 (CA10 1992) (both cited in Govt. Opp. Cert. at 9), the courts of appeals applied the common-law presumption that every person knows the law but did not address the question presented here: whether a defendant under Sections 2511(1)(c) and 2511(1)(d) may rebut that presumption through authoritative evidence such as that presented by WFAA and Riggs. In that regard, respondents have nothing of substance to say regarding *Kratz* v. *Kratz*, 477 F. Supp. 463 (E.D. Pa. 1979), where the court held that a defendant

had raised an issue of material fact regarding whether a client had reason to know of the illegality of interceptions where the attorney had, after legal research, advised the client that the interceptions were lawful.[3]

The private respondents do not deny that WFAA and Riggs received advice directly from their own counsel that it was legal to intercept and record telephone conversations from a cordless phone, but they dispute whether Harman received similar advice from law enforcement authorities. Peavy Opp. Cert. at 2, 22. The uncontroverted record in this case, however, is that Harman was advised by the Dallas County District Attorney and Dallas Police Department that his actions were legal. Pet. App. 3a, 65a-66a. Respondents rely on the trial record in a different case involving different parties. In any event, the Fifth Circuit's holding on the scienter requirement does not depend on any factual issue. The court of appeals held that petitioners would be liable even if they had received authoritative legal advice that their conduct was lawful. Pet. App. 29a-31a. Any factual disputes can be resolved on remand.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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[3] See 477 F. Supp. at 477 ("[A] defendant cannot be held liable under §§ 2511(1)(c) or (1)(d) unless he or she knew or had reason to know that the information used or disclosed was obtained from interceptions made in violation of § 2511(1). The defendants, of course, maintain that they acted in reliance upon *Simpson* and believed the interceptions were not in violation of § 2511(1). Although we have held that *Simpson* is erroneous, we think that if *Simpson* was the only federal case interpreting Title III which was available to a reasonably diligent attorney at the time Cadmus did his research, then the defendants indeed had no reason to know their conduct was unlawful. * * * [S]ummary judgment cannot be granted with respect to the defendants' liability under §§ 2511(1)(c) and (1)(d).").

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